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A

COMPENDIUM

OF

ENGLISH AND SCOTCH LAW

STATING THEIR DIFFERENCES.

With a Dictionary of Parallel Terms and Phrases.

59880

BY

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TO

SIR RICHARD BETHELL, KNIGHT,

HER MAJESTY'S ATTORNEY-GENERAL,

ND FOR MANY YEARS THE LEADING COUNSEL IN SCOTCH APPEALS,

WHOSE

PRE-EMINENT POWERS, AS AN ADVOCATE,

HAVE OFTEN BEEN DISPLAYED

IN ILLUSTRATING THE CONTRASTS AND ANALOGIES OF

ENGLISH AND SCOTCH LAW,

THIS WORK

IS, WITH GREAT RESPECT, AND BY EXPRESS

PERMISSION,

INSCRIBED BY THE AUTHOR.

PREFACE.

ENGLAND and Scotland have long been running the race of civilization under similar circumstances. But it is well known that their laws are nearly as distinct as if each was a foreign country to the other. Though it may be true in a general sense that the result is now much the same in both countries as regards the main elements of rational liberty, yet the details of the respective processes by which this result is attained often differ widely. The founders of Scottish jurisprudence having drawn largely upon the Roman law for its principles and its nomenclature—for both of which the predecessors of Coke as well as his successors have not hesitated their dislike—a foundation was thus early laid for diversities which have been only extended and consolidated by time. Each code speaking a barbarous language to the other—ignoring and being ignored—has groped its way alone; working out the problem of justice by peculiar and circuitous methods, yet often unconsciously gravitating towards the same conclusions. A common Legislature, and in many respects a common Supreme Court have latterly, no doubt, confined them very much within the same channel. Yet, notwithstanding many approximations, assimilations, and roundings of angularities, the law of the one country is still a sealed book to the other. England rather glories in her ignorance; and Scotland confidently rebukes this insular pride by counting over the adaptations from her own code, which have now and then

been paraded by her neighbour under new names as original reforms.*

English lawyers do not profess to know anything of the law of Scotland, and seldom, if ever, resort to it either for principles or illustrations. It is often otherwise with Scottish counsel. Whenever there is an opening, or the necessities of their argument point the way, one or other of the parties seldom fails to call in aid details from the ample storehouse of English Law. Yet so ambiguous are found to be the responses from this quarter, that the Scottish Courts generally refuse to follow into the forbidden ground, and end by rebuking such curiosity as at once perplexing and unprofitable.†

* The late Lord Cockburn, in 1846, when commenting on certain recent reforms in the law of England, thus expressed the views of Scottish lawyers:—

"The improvements thus introduced or recommended in England amount, in a really surprising number of instances, to little else than to an approximation to the law of Scotland. Not that the law of Scotland has been often avowedly taken as the type; on the contrary, nothing is more curious than the composure with which all allusion to this law, even when it is copied, is avoided. Nevertheless, not being able to reject what was right, merely because it was Scotch, the English reformers have been driven to do from necessity, what we have been long doing from choice.

"A full and minute detail of the recent English amendments, one by one, with the corresponding practices in the law of Scotland, would be the subject of a most curious and useful work, or rather it ought to pervade an exposition of the differences between the laws of the two countries—a work which, considering the intercourse now existing between the kingdoms, and the appellate jurisdiction of English lawyers, with their unavoidable English leanings, over Scotch causes, it is surprising has never yet appeared. But we can confidently state this, that no one can study the English Reports and Statutes with a view to Scotch analogies, without being satisfied, that in a large majority of cases the evil to be rectified in England does not exist in Scotland, and that the English remedy resolves itself into a reduction of their law into ours. The recent amendments of the law of England, though not the best, are the most palpable of the trophies of the law of Scotland."—*Edin. Review*, vol. 83 (Jan. 1846) p. 202.

† Two of the most learned Scottish Judges in modern times recently thus expressed themselves:—

"The more I am able to collect of English law, I am only the more confident that we do not understand nine out of ten of the cases which are quoted to us, and that in attempting to apply that law, we run the greatest

As Scotland still resolutely asserts her distinct nationality, and there is no immediate prospect of her renouncing her native laws, and unlearning the language in which they are written, the necessity of some key of intercommunication between the two codes is apparent and has long been felt. The populations are now so intermixed by the complicated ties of relationship, residence, and commerce, that there are few who do not occasionally suffer inconvenience from finding their legal rights abruptly dislocated, or shrouded in mystery, by simply passing across the Border. This is peculiarly felt by the gradually increasing class of persons, who hold property, and maintain business relations and establishments in both countries. Legal advisers in such cases are generally as much in the dark as their clients. The marked difference of professional language has led to a settled state of "imperfect sympathies" between English and Scotch lawyers; and an interpreter is generally required. What is obviously wanted, therefore, is some work, which will enable a person, who has by habit become tolerably familiar with his legal bearings in one country to ascertain with some precision his latitude, when occupying an analogous position in the other.

The difficulty, however, of producing such a work has hitherto probably prevented its being undertaken. In order

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risk of spoiling our own by mistaking theirs."—*Per* Lord Justice Clerk Hope in *M'Cowan* v. *Wright*, 15 Dec. 1852.

"As to the English cases quoted to us, and the observation that we should be slow in going contrary to the views entertained in England, I think that observation is very strong, in regard, for instance, to the construction of statutes; and that when one construction is put on a statute at one end of the island, we should be slow to put another construction on it at the other end. But the same observation does not apply to our common law; with regard to that, I do not inquire what may be the common law of England. If we are satisfied that our law is right, we must hold by it; and if our law is better than that of England, I think it is for them to change their law to ours, and not for us to alter ours by theirs.—*Per* Lord Colonsay (now Lord President M'Neill) in *Lord Advocate* v. *Kilgour* (Justiciary Court) 8 Dec. 1851.

to do it effectually, one must not only clearly understand the phraseology of the two codes, but in placing each detail of the one in juxtaposition with the corresponding detail of the other, it is necessary to consider, whether an apparent conflict at one point is not neutralised by some peculiarity in another though remote department, inattention to which might only mislead the inquirer. Hence, in order to be really useful, the work should embrace the entire field of the law in its several departments, so that its aggregate provisions may be thoroughly collated. The magnitude of this task, however, and the voluminous proportions which would seem to be requisite to work it out, might well deter any author from embarking in it.

The Author is not presumptuous enough to assert that he has surmounted all these difficulties. The present work was undertaken many years ago; and its completion has been delayed chiefly by the great labour attending it, and especially the wish to discover the most effectual means of compressing its bulk and securing its accuracy. After great consideration and several changes in the plan adopted, the Author ventures to think that he has at last fixed upon one, which, as far as practicable, will secure the object in view. It is obvious that to state the English law, more or less condensed on one page, and then the Scotch law on the next page—each in its own technical language—would add very little to a person's real information, as might easily be ascertained by interleaving Blackstone with Erskine. In the haze thereby created the difficulty would be to find out the exact point of collision. The first requisite to precision seems to be a Dictionary of all parallel terms and phrases, stating as nearly as possible, what things are known under one name in the one country, and under a different or slightly different name in the other country. That being supplied, the next object is to secure a reasonable brevity and precision in the statement of the differences between

the two laws. The Author has thought that that precision can best be attained by stating an intelligible proposition in such a form, that it would be sound law in one country, but the contrary, or some material modification of it, would be sound law in the other. By this plan a great deal of superfluous matter may be safely eliminated—treating as superfluous those parts of the law which are the same in both countries; so that whenever the only definable differences consist in the mere use of different phraseology, these can be satisfactorily disposed of by reference to the Dictionary of Phrases.

The plan of this work, therefore, is based on the assumption that the laws of the two countries are the same in substance, except where the contrary is here expressly stated. What remains after such a process of exhaustion constitutes the staple of the work. In order to avoid unnecessary confusion by the use of a mongrel phraseology, the author has strictly adhered in the text to the use of the English law language, leaving the contrarieties and qualifications, required by the law of Scotland to each corresponding proposition, to be stated in the notes, and these he has generally expressed in the Scotch law language, so far as was deemed expedient and intelligible to the English lawyer. The Dictionary contains a collection of nearly every technical term and all the leading phrases used in both countries, with their equivalents, or their nearest and most intelligible analogies; it also serves as a very copious index to the previous part of the work.

It is proper to explain, that though the Author has considered it necessary in most cases to give his authorities, yet the English lawyer will occasionally find propositions, or negatives of propositions, stated here with unusual prominence, and which may seem either superfluous or needlessly elementary. This has been done, however, merely to bring out more conspicuously, and according

to the plan adopted, some corresponding differences in the Scotch law.

It may, perhaps, be expected in such a work as the present, that the Author would have indulged in occasional comments on the superiority, or supposed superiority, of the law of the one country to the law of the other; and some disappointment may be felt by law reformers that he has not "taken a side." It is, however, enough to say, that the labour already undertaken has been quite sufficient for one occasion; and that, as the foundation of all law reform must be a sound knowledge of the law as it now exists, if the Author has succeeded in conveying such knowledge, law reformers, whether professional or lay, having the materials provided to their hand, can be at no loss to do the rest, and draw their own conclusions. In the present temper of law reformers nothing seems impossible. But as the assimilation of the laws of England and Scotland may probably continue, for some time to come, to be a difficult question of rival nationalities—which is apt to degenerate too easily into one of personalities—the present generation cannot be displeased at being provided with greater facilities for ascertaining the extent of the present differences, whether or not such differences may extend into "the next ages."

The Author cannot conclude without expressing his great obligations to one who is *utroque jure peritus*—Mr. James Anderson, Q.C.—for his valuable assistance and suggestions; and also to Mr. John Robertson, S.S.C., of Hanover Street, Edinburgh, for much practical aid respecting many points of Scotch law.

J. P.

The Temple, *February* 1860.

ADVERTISEMENT TO THE SECOND EDITION.

THE changes in the Law, which have been effected by statutes and leading decisions since the First Edition of this Work appeared, have been incorporated in the present Edition, but without very materially enlarging the size. That Part of the Work relating to Public Law—by which is meant those laws more directly affecting the rights of the public—has been greatly enlarged, with a view to render the Work more useful to Legislators and Country Gentlemen. The Part on Private International Law has also been much extended, so as to incorporate the results of decisions and statutes bearing on points of jurisdiction which have of late years been constantly increasing in interest and importance.

J. P.

GOLDSMITH BUILDING, TEMPLE,
February 1865.

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11 & 12 Vic. c. 42.—An Act to Facilitate the Performance of the Duties of Justices of the Peace [1848] - - - 454

12 & 13 Vic. c. 106.—An Act to Amend and Consolidate the Laws relating to Bankrupts in England [1849] - - - 455

17 & 18 Vic. c. 34.—An Act to Enable Courts of Law in England, Ireland, and Scotland, to compel the Attendance of Witnesses out of their Jurisdiction, and to give Effect to the Service of such Process in any Part of the United Kingdom [1854] 458

19 & 20 Vic. c. 60.—An Act to Amend the Laws of Scotland affecting Trade and Commerce [1856] - - - 459

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19 & 20 Vic. c. 79.—An Act to Consolidate and Amend the Laws relating to Bankruptcy in Scotland [1856] - - 467

21 & 22 Vic. c. 56.—An Act to Amend the Law relating to Confirmation of Executors in Scotland, and to extend over all Parts of the United Kingdom the effect of such Confirmation, and of Grants of Probate and Administration [1858] - 471

22 & 23 Vic. c. 63.—An Act to Afford Facilities for more certain ascertainment of the Law administered in one Part of Her Majesty's Dominions, when Pleaded in the Courts of another Part thereof [1859] - - - - - - 475

DICTIONARY OF PARALLEL TERMS and Phrases in the Laws of England and Scotland, with Index of Matters - - - 477

LIST OF THE PRINCIPAL ABBREVIATIONS USED.

SCOTCH AUTHORITIES.

Act of S.	Act of Sederunt.
Alis. Pract. . . .	Alison's Practice of the Criminal Law.
Bankt.	Bankton's Institute of the Law of Scotland.
Bell's Ap. C. . .	Bell's Appeal Cases in the House of Lords.
Bell's Com. by Shaw.	Bell's Commentaries, by Shaw.
Bell's Ill.	Bell's Illustrations of the Law of Scotland.
Bell's Pr.	Bell's Principles of the Law of Scotland (4th ed.)
Br. Sup.	Brown's Supplement to Morison's Dictionary.
Broun	Broun's Justiciary Reports.
D. B. M. . . .	Dunlop, Bell, Murray, and Co.'s Reports in the Court of Session; often called the Second Series.
Duff, F. C. . . .	Duff on Feudal Conveyancing.
Elch.	Elchie's Decisions.
Ersk.	Erskine's Institutes of the Law of Scotland.
F. C.	Faculty Collection of Cases.
Fraser, D. R. . .	Fraser on the Domestic Relations.
Hailes	Hailes' Cases in the Court of Session.
Hunter, L. & T. .	Hunter on the Law of Landlord and Tenant.
Hume, Cr. L. . .	Hume's Commentaries on the Criminal Law of Scotland (4th ed.)
Hume, D. . . .	Hume's Decisions in the Court of Session.
M.	Morison's Dictionary of Decisions in the Court of Session.
Mack.	Mackenzie's Institutes of the Law of Scotland.
Macf. Pr. . . .	Macfarlane's Practice of the Court of Session in Jury Causes.
Macq. Ap. . . .	Macqueen's Reports of Scotch Appeals.
Murr.	Murray's Reports of Jury Cases.
Menz. Conv. . .	Menzies' Lectures on Scotch Conveyancing.
Napier on Presc. .	Napier on the Law of Prescription.
Paton, Ap. C. . .	Paton's Appeal Cases.
Rob. Ap. C. . . .	Robinson's Appeal Cases.
Ross, L. C. . . .	Ross's Leading Cases in the Law of Scotland.
S. D.	Shaw and Dunlop's Reports of the Court of Session, sometimes called the First Series.

Sc. Jur.	The Scottish Jurist Series of Reports.
Sh. Ap.	Shaw's Appeal Cases.
Sh. & M'L.	Shaw and M'Lean's Appeal Cases.
Shand's Pr.	Shand's Practice of the Court of Session.
Stair	Stair's Institutes of the Law of Scotland.
Thomson on Bills	Thomson on the Law of Bills of Exchange (2d ed.)
W. S.	Wilson and Shaw's Appeal Cases.

ENGLISH AUTHORITIES.

A. & E.	Adolphus and Ellis's Queen's Bench Reports.
Atk.	Atkins' Chancery Reports.
B. & Ad.	Barnewell and Adolphus.
B. & Ald.	Barnewell and Alderson's Reports.
B. & C.	Barnewell and Cresiwell's Reports.
B. & B.	Broderip and Bingham's Reports.
B. & P.	Bosanquet and Puller's Reports.
Beav.	Beavan's Chancery Reports.
Bl. Com.	Blackstone's Commentaries.
Bligh.	Bligh's Reports.
Burr.	Burrow's Reports.
Byles	Byles on Bills of Exchange.
C. B.	Common Bench Reports.
C. B., N. S.	Common Bench Reports—New Series.
Camp.	Campbell's Nisi Prius Reports.
Car. & K.	Carrington and Kirwan's Reports.
Car. & M.	Carrington and Marshman's Reports.
C. & P.	Carrington and Payne's Reports.
Cl. & F.	Clark and Finnelly's Reports.
Cr. & J.	Crompton and Jervis's Reports.
Cr. & M.	Crompton and Meeson's Reports.
C. M. R.	Crompton, Meeson, and Roscoe's Reports.
Cr. & P.	Craig and Phillip's Reports.
De G. M. & G.	De Gex, Macnaghten, and Gordon's Reports.
Drewr.	Drewry's Reports.
Dr. & W.	Drury and Warren's Reports.
Exch.	The Exchequer Reports.
E. & B.	Ellis and Blackburn's Reports.
H. Bl.	Henry Blackstone's Reports.
H. & N.	Hurlstone and Norman's Reports.
H. L. Cas.	House of Lords' Cases, by Clark.
Mac. & G.	Macnaghten and Gordon's Reports.
M. & S.	Maule and Selwyn's Reports.
M. & W.	Meeson and Welsby's Reports.
Mod.	Modern Reports.
Moore P. C.	Moore's Privy Council Reports.
M. & Rob.	Moody and Robinson's Reports.
Myl. & Cr.	Mylne and Craig's Reports.
My. & K.	Mylne and Keen's Reports.
P. Wms.	Peere Williams' Reports.

Q. B.	The Queen's Bench Reports.
R. & R.	Russell and Ryan's Reports.
Russ. & M. . . .	Russell and Mylne's Reports.
Ry. & M.	Ryan and Moody's Reports.
Scott	Scott's Reports.
Scott, N. R. . . .	Scott's New Reports.
Smith's Comp. . .	Smith's Compendium of Real and Personal Property.
Smith's L. C. . . .	Smith's Leading Cases.
Spence, Eq. Jur. . .	Spence's Equity Jurisprudence.
Story, Eq. Jur. . .	Story's Equity Jurisprudence.
Tudor's L. C. . . .	White and Tudor's Leading Cases.
Ves.	Vesey's Chancery Reports.
Ves. Sen.	Vesey (Senior's) Chancery Reports.
Wms. Exec. . . .	Williams on the Law of Executors and Administrators.
Wms. Real P. . .	Williams' Real Property.
Y. & C. C. R. . .	Younge and Collier's Chancery Reports.
Y. & C. Ex. R. . .	Younge and Collier's Exchequer Reports.

ADDENDA ET CORRIGENDA.

P. 44, *n.* 2—*for* "debtor's solicitor" *read* "creditor's solicitor," *and add,* "See *post,* § 1226 *n.*"

P. 102, § 302—*for* "has expired," *read* "has not expired."

P. 175 *n.*—*for* "judgment" *read* "payment."

P. 306—The figures in the text referring to the notes are misplaced. The figures 4, 5, 6, should be 3, 4, 5, respectively; and the figure 6 should be added to the end of sec. 916.

A COMPENDIUM

OF

ENGLISH AND SCOTCH LAW.

ARRANGEMENT OF MATTERS.

THE subject of this work is arranged, for the sake of convenience, under the following heads, which are those most familiar to modern lawyers:—PART I. treats of Real Property, subdivided into the various heads of Crown Rights, Freeholds, Copyholds, Estates Tail, Estates for Life, and all those miscellaneous Rights which more naturally belong to Things Real. PART II. treats of Personal Property, including the subject of Contracts, Mercantile Law, and such Rights of the Person as do not fall under other heads. PART III. treats of Succession, subdivided into Wills and Executors, and into Intestacy or Descent, and Administration under the Statute of Distributions. PART IV. treats of the Domestic Relations, subdivided into Parent and Child, Master and Servant, and Marriage. PART V. treats of Public Law, embracing Crimes and Criminal Procedure, Church, Poor Law, Public Burdens, and matters more or less affecting the Public. PART VI. treats of Courts and their Procedure, embracing the Division of Courts, their Jurisdiction, Forms of Actions and Suits, and their steps. This part also embraces the subjects of Bankruptcy, Insolvency, Legal Profession, Evidence, Arbitration, etc. PART VII.

treats of several international questions of law arising between parties in England and Scotland, with observations as to the conduct to be pursued by a party not resident in the country where he seeks his remedy.

It will be seen that there are few of the subjects arranged under any one of the above heads, which are not more or less connected with subjects falling under some other head. This inconvenience, however, is equally incident to every other possible arrangement of matters; and it is conceived, that so multifarious a collection of points of law is best arranged in that way which will enable the practitioner most readily to find what he wants.

The Dictionary at the end of the work, which also serves the purpose of a very copious index, embraces all the terms and phrases current in the law of England, as well as the law of Scotland, with the corresponding term or phrase equivalent to each respectively in the law of the other country, omitting only those ancient and obsolete terms, which are now mere objects of interest to the antiquarian.

PART I.

REAL PROPERTY, AND RIGHTS INCIDENTAL THERETO.

CHAPTER I. RIGHTS AS BETWEEN THE CROWN AND THE SUBJECT IN LAND, ETC.

II. TENURE OF LAND.

III. FREEHOLD ESTATES OF INHERITANCE.

IV. FREEHOLD ESTATES, NOT OF INHERITANCE.

V. ESTATES LESS THAN FREEHOLD.

VI. ESTATES HELD UPON CONDITIONS, MORTGAGES, ETC.

VII. ESTATES IN POSSESSION, REVERSION, AND REMAINDER.

VIII. JOINT ESTATES.

IX. COPYHOLDS.

X. TRUSTS.

XI. EASEMENTS, AND THINGS INCORPOREAL.

XII. PRESCRIPTION.

XIII. SALE OF LAND.

XIV. DEEDS, CONVEYANCES OF LAND, AND REGISTRATION OF TITLES.

XV. LANDLORD AND TENANT.

CHAPTER I.

RIGHTS AS BETWEEN THE CROWN AND THE SUBJECT IN LAND AND THINGS FOUND ON LAND.

1. *Generally.*—Though all the lands in the possession of the subject are presumed to have been originally derived from the Crown as lord paramount, the subject is not now obliged to resort to the Crown at every death or alienation to have his title confirmed or the tenements regranted.[1] As between the Crown and the subject, the latter enjoys a freehold of the lands, without the interference of the Crown, or paying any fines, either on alienation, devise, or descent. But there are some rights presumed to be still retained by the Crown in all cases, unless they have been specially granted to the subject or adversely acquired by the latter; and the Crown has some perquisites as to certain chattels found on land.

2. *Sea-shore.*—*Prima facie*, the soil of the sea-shore, or the fore-shore surrounding England and Wales, belongs to the Crown, and not to the owner of the adjacent manor or soil of which it is the boundary. In this sense the limit on the land side is defined to be the medium line of high-water of all the tides in the course of the year, or the height of the medium tides in each quarter of a lunar revolution during the whole year.[a] But this presumption may be rebutted by showing that the fore-shore has been granted[2] to the lord of the

[a] *Att.-Gen.* v. *Chambers*, 4 De G. M. & G. 206.

IN SCOTLAND.

[1] *Contra.* See next two chapters.

[2] The same. See Stair, 2, 1, 5; Ersk. 2, 6, 17; *Boucher* v. *Crawford*, 30 Nov. 1814, F.C.; *Smith* v. *Officers of State*, 6 Bell's Ap. 487; *Galbreath* v. *Armour*, 4 Bell's Ap. 374. If, however, the charter states the sea to be the boundary, the fore-shore is included in the grant, but subject to the public use of navigation and fishing. See M. 12,810; Hume's Dec. 555; *Suttie* v. *Gordon*, 15 S. D. 1037; *Berry* v. *Holden*, 3 D. B. M. 205; *Cameron* v. *Ainslie*, 10 D. B. M. 446; *Nicol* v. *Blaikie*, 22 D. B. M. 335.

adjacent manor, or even to a stranger, prescriptive possession presuming a grant.[a] There is no common-law right of *bathing*[1] in the sea so as to justify a trespass on private lands; but a custom if immemorial may exist at certain places to justify such trespass.[b] The right to take *sea-weed, shells, and gravel*,[2] goes with the ownership of the fore-shore, and does not belong to the public, except where a local custom to that effect is proved, and is reasonable.[c]

3. *Escheat.*—It is an incident of all estates in fee-simple, and which has existed from the earliest times, that when the owner dies without leaving any heirs, lineal or collateral, his estate escheats to the Crown,[3] unless a lord of the fee can still be traced, by whose ancestors the lands were anciently granted—a case, however, which seldom occurs. The principle on which escheat is founded is not that the Crown is the ultimate heir, but that the land reverts, after the tenant's issue is extinct, to the lord from whom it originally came.[d] Bastardy is the most usual cause of the failure of heirs. So, where the tenant has been attainted for treason, the lands are forfeited to the Crown.[e] In case of a conviction for murder, the estate escheats to the lord, if any, subject, however, to the Crown's possession for a year and day.[f]

4. *Wreck.*—Wreck originally belonged to the Crown, and a subject

[a] Hale, *De Jure Maris*, by Hargr. 26; *Constable's* Case, 5 Rep. 107*a*; *D. Beaufort* v. *Swansea*, 3 Exch. 413.

[b] *R.* v. *Crunden*, 2 Camp. 89; *Blundell* v. *Catterall*, 5 B. & Ald. 268.

[c] *Ibid.*, Paterson's Fishery L. 29.

[d] 2 Bl. Com. 72; Scriv. Cop. 757.

[e] 4 Bl. Com. 381; 39 Geo. III. c. 93.

[f] 2 Bl. Com. 245; 4 Bl. Com. 385.

IN SCOTLAND.

[1] The same; but a right by local custom is not recognised.

[2] So as to kelp; M. 5151; M. 13,528; gravel, *D. Hamilton* v. *Aikman*, 6 W. S. 64; sea-weed, shells, etc., *Baird* v. *Fortune*, 33 Sc. Jan. 437; *L. Saltoun* v. *Park*, 20 D. B. M. 89; *Paterson* v. *M. Ailsa*, 8 D. B. M. 752. Local custom is no title.

[3] On the vassal's death without heirs, the land goes to the Crown (and not to the superior), on a different principle, viz., that the Crown is *ultimus haeres*. Ersk. 3, 10, 2; Stair, 2, 3, 47. M. 3409. This difference may often be important, for when the Crown succeeds as the heir, and not as a purchaser, the Crown is bound by the equities affecting an heir. Sentence of death, except for treason, is no escheat of the fee.

might claim it by custom, charter, grant, or prescription.[a][1] But now, by statute, a receiver of wreck in every district is appointed, whose duty is to advertise the existence of wreck, and the owner of the goods is entitled to them if claimed within a year; after which the lord of the manor, etc., may show his title; failing which, the goods are sold, and the proceeds paid to the Consolidated Fund.[b]

5. *Swans.*—It is a perquisite of the Crown[2] to have swans upon the sea and navigable rivers, and they are *prima facie* presumed to belong to the Crown; but the Crown can grant this right to a subject, or the latter may claim it by prescription.[c]

6. *Fisheries, Game.*—Previous to Magna Charta the Crown assumed the right to grant to a subject a several fishery in the sea and navigable rivers; and to this day an individual who can show a grant of the Crown, or immemorial possession (which presumes a grant) prior to Magna Charta, is entitled to exclude the public from taking every kind of fish.[d] But the Crown cannot now grant such several fishery, either of salmon[3] or any other fish, for all the public have, *prima facie*, a right to fish in the sea and navigable rivers for every kind of fish.

[a] 1 Bl. Com. 291.
[b] Merchant Shipping Act, 17 & 18 Vic. 104, § 439, *et seq.*
[c] Dav. Rep. 56 (*a*); 7 Rep. 17.
[d] Paterson's Fish. L. 14, 20; *Malcolmson* v. *O'Dea*, 10 H. L. Cas., 593.

IN SCOTLAND.

[1] The same. 2 Bell's Ill. 374, 375. The same statute now governs.

[2] *Contra.* The Crown had no such right. See Ersk. ii. 1, 2; *ibid.*, ii. 6, 15.

[3] *Contra.* The right of the Crown has never been interfered with, and to this day the exclusive right of salmon-fishing (except by the rod) in all the seas and rivers (navigable or not) is vested in the Crown, unless it can be shown to have been granted away to a subject. Such subject can only show a grant by producing a written title. Such title may be express; or general—*i.e.*, a grant of lands *cum piscationibus*, but prescriptive possession is essential to define a general grant. Paterson, F. L. 175; *Gammell* v. *Woods and Forests*, 3 Macq. 442. The Crown could not, however, grant the exclusive right to other floating fish (than salmon) in the sea, but it is still undecided as regards oyster-fishing; *Woods and Forests* v. *Maitland*, 33 Sc. Jur. 102, 106; Mussels, *D. Argyll* v. *Robertson*, 32 Sc. Jur. 106; Lobsters, *D. Portland* v. *Gray*, 11 S. D. 14. As to streams not navigable (except as to netting salmon), the right to fish is a riparian right. See also *post*, Part V. c. 3.

As to rivers and streams not navigable, the right to fish for all fish is a riparian right, and has no connection with the Crown.[a]

The Crown has a right to all royal fish—*i.e.*, whales and sturgeons,[1] caught within the territorial seas.

The right of a freeholder to kill *game* was not derived from the Crown, being an incident of ownership; but to this day some peculiar rights, called rights of forest, chase, and free warren, which confer certain privileges, must be shown to be derived from the Crown.[b][2]

7. *Tolls.*—The grantee, or owner of a toll-thorough—*i.e.*, a toll upon goods passing over the soil in which he has no interest—cannot recover it, without showing a consideration[3] for his grant, such as the repair of a road or bridge, as well as usage.[c]

The grantee, or owner of a port, who claims to levy toll, must show a grant or prescription. He is bound, it seems, to repair[4] the port, and may be indicted for not doing so.[d]

8. *Ferries.*—Where a right of ferry exists from B to L, and a person comes near it—as, for example, within 400 yards—and interferes by carrying goods and passengers for hire, he is liable to an action.[e][5] A custom for the inhabitants of a certain village to pass over a ferry, toll-free, is good, if reasonable.[f]

9. *Mines.*—The crown has, *prima facie*, a right to all mines of

[a] Paterson, F. L. 2, 49. See also *post*, Part V. c. 3.

[b] Paterson, Game L. 18. See further as to game, *post*, Part V. c. 3.

[c] Cro. Eliz. 711; W. Jon. 162; *Brett* v. *Beales*, 10 B. & C. 508; *Smith* v. *Shepherd*, Moore, 574.

[d] *Wilkes* v. *Kirby*, 2 Lutw. 1519.

[e] *Pim* v. *Curell*, 6 M. & W. 234; *Huzzey* v. *Field*, 2 C. M. R. 432; *Blacketer* v. *Gillett*, 9 C. B. 26.

[f] 1 Show. 257.

IN SCOTLAND.

[1] Whales only of a large size. Stair, ii. 1, 33; Ersk. ii. 1, 2.

[2] *Contra.* Forestal and other Crown rights to game or deer are not now recognised. *D. Athol* v. *Macinroy*, 34 Sc. Jur. 332. See *post*, Part V. c. 3.

[3] This is disputed. See *Edin. & Glasg. R. Co.* v. *Mag. of Linlithgow*, 1 Macq. Ap. 1, 3 Macq. 691.

[4] *Contra*, he is bound only to apply the dues toward repairs. *Officers of State* v. *Christie*, 16 D. B. M. 454; 18 D. B. M. 727; *Min. of Edin.* v. *Mag. of Edin.*, 16 S. D. 400 and 1171.

[5] It seems the same. 2 Bell's Illustr. 4, 7; *Ferguson* v. *Dowall*, 18 Jan. 1815, F.C. *Mag. of Edin.* v. *Scot*, 14 S. D. 622; *Greig* v. *Mag. of Kirkcaldy*, 8 D. B. M. 1247, 13 D. B. M. 975; *Cuming* v. *Smollet*, 14 D. B. M. 885.

gold and silver;[a] but where these metals are found in mines of tin, copper, iron, or other base metal, the only right the crown has, is to take the gold ore at a price fixed by statute.[b] The right of the crown to these mines is inalienable.[1]

10. *Treasure-trove.*—The crown is entitled to treasure-trove,[2] wherever found; that is, to coin, gold, silver, or plate, hidden in the earth, the owner of which is unknown;[c] the finder being liable to fine and imprisonment for not surrendering them to the crown.[d] But the finder,[3] and not the crown, is entitled to things merely lost, or *not* hidden *in* the earth, the owner of which cannot be found.[e] Waifs, *i.e.*, goods thrown away by a thief in his flight, belong to the crown; but the owner, on doing diligence to prosecute and convict the thief, can have them again.[f]

11. *Estrays.*—The crown is also entitled to *estrays*,[4] *i.e.*, animals not *ferae naturae*, as cattle, sheep, horses, etc., of which the owner is not known; unless the crown has given the right, by special grant, to the lord of the manor, where they are found. But the true owner may always have them, within a year and a day, on paying for their keep.[g]

12. *Highways.*—The freehold, or soil of highways, is in the adjoining owner;[5] and if there is a different owner on the other side, and no clear evidence as to boundary, each has the freehold up to the middle.[h] Hence the adjacent owner has the entire right of property,

[a] 2 Inst. 577.
[b] 1 W. 3. st. 1, c. 30, 5 W. 3 c. 6; 55 Geo. 3 c. 134. As to Cornwall and Devon mines, see 1 & 2 Vic. c. 120; 1 & 2 Vic. c. 43.
[c] 3 Inst. 132; Dalton on Sheriff, c. 16.
[d] *Ibid.*
[e] *Armory* v. *Delamire*; 1 Smith, L. C. 256.
[f] Cro. Eliz. 694. Finch, 212; *Constable's case*, 5 Rep. 109; 4 Bl. Com. 363.
[g] Mirr. c. 3 § 19. Bro. Abr. Estray. 1 Roll. Abr. 879.
[h] 8 Hen. 7, 5; 2 Inst. 705; 1 Burr. 133; 2 T. R. 232.; 2 Str. 1004; *Doe d. Pring* v. *Pearsey*, 7 B. & C. 306.

IN SCOTLAND.

[1] The crown's right was alienable. Stat. 1424, c. 12; 1592 c. 12; 2 Bell's Ill. 12.

[2] The same. Stair, ii. 1, 33; Ersk. ii. 1, 12; M. 13,523.

[3] *Contra. Ibid;* but see *Sands* v. *Bell*, 22 May 1810, F. C.

[4] The same, but the finder must inform the sheriff. Ersk. ii, 1, 12

[5] The soil is generally said to be in the crown, as a trustee for the public. But it seems difficult to reconcile this view with the reversal of the House of Lords in *Galbreath* v. *Armour*, 4 Bell's Ap. C. 374. See also *M. Breadalbane* v. *M'Gregor*, 7 Bell's Ap. 43.

subject only to the easement of the public. Thus, if there is a strip of ground between the road and his close, this is presumed to belong either to him,[a] or to the lord of the manor, if the strip should communicate with other parts of the manor.[b] So all the trees upon the roadside, and mines under the road, belong to the adjacent owner or owners, who may also carry water-pipes under it, and bring an action of trespass against any person digging or injuring the soil.[c]

As to road trustees, etc., see *post*, Part V.

CHAPTER II.

TENURE OF LAND.

13. All lands originally belonged to the crown, as lord paramount, and were held of the crown according to the feudal system; but practically, the relation between the crown and its vassals, as tenants *in capite*, is entirely broken.[1] It is now only in theory that lands in the hands of subjects are said to be held of the crown.

14. The old feudal tenures were abolished by the statute 12 Ch. II. c. 24, leaving only two, viz., Common Socage or Freehold, and Copyhold. The statute of *Quia Emptores*, 18 Ed. I. c. 1, having prohibited subinfeudation, it is no longer[2] in the power of any subject, by any operation of conveyancing, to carve out portions of his estate, and grant them in perpetuity, so as to create a chain of dependent vassals or villeins, each acknowledging a *mesne* lord, who retains his seignory over those below, and is himself a vassal to other mesne lords above, and so by gradations reaching to the Queen, as lady paramount.

15. There are also three varieties of tenure, besides freehold

[a] Ibid, *Steel* v. *Pricket*, 2 Stark. 463; *Stevens* v. *Whistler*, 11 East. 51.

[b] *Doe d. Barret* v. *Kemp*, 2 Bing. N. C. 102; *Grose* v. *West*, 7 Taunt. 39.

[c] *Goodtitle* v. *Allen*, 1 Burr. 133.

IN SCOTLAND.

[1] *Contra.* See *post.*

[2] *Contra.* See *post.*

proper, included under the general description of freeholds, viz., petit sergeanty, tenure in burgage, and gavelkind. *Petit Sergeanty*[1] is a tenure, under which a subject holds of the crown for some fixed but nominal service, such as annually rendering a bow, or lance, or sword.[a] Tenure in *Burgage*[2] is the holding, under which some tenements in ancient burghs are held of the crown or a lord, by a small fixed rent; but this tenure is of trifling importance.[b] It exists by ancient custom; and one of its characteristics is, that the land descends to the youngest, instead of the eldest son, being then called the custom of *Borough English*.[3] *Gavelkind*[4] is a tenure, by which most of the lands in Kent, and a few other places, are held for a nominal but fixed service of fealty. Its chief peculiarity consists in this, that in case of intestacy, the land descends to all the sons together,[c] and not to the eldest alone.

16. *Copyhold*[5] tenure, under which lands are held in all parts of England, exists by ancient custom; the tenants holding of the lord of the manor by copy of the court rolls. It differs from freehold tenure, chiefly in its incidents, which are base, and consist of fines, heriots, reliefs, escheats, etc. It differs also in its conveyancing. Copyhold tenure may now be compulsorily converted into freehold tenure, either by the lord or the tenant.[d] Customary freehold is a variation of copyhold tenure.

[a] 2 Bl. Com. 82. [b] 2 Bl. Com. 83. [c] Robinson on "Gavelkind." Co. Litt. 140*a*. [d] See 2 Bl. Com. 96. See *post*, "Copyholds."

IN SCOTLAND.

[1] Blenchholding is the same, into which the old wardholdings were converted by 20 Geo. II. c. 50; 25 Geo. II. c. 20; Ersk. ii. 4, 7.

[2] A peculiar tenure called burgage tenure prevails in royal burghs, each vassal holding directly of the crown, the magistrates being commissioners of the crown for the purpose of entering vassals, and subinfeudation being incompetent. In other respects the titles on death and alienation resemble the ordinary feuholding. See *Dawson* v. *Mag. of Glasgow*, 2 W. S. 230; 4 W. S. 81; 10 and 11 Vic. c. 49; Menzies' Convey. 786.

[3] Not known. [4] Not known.

[5] Feuholding nearly resembles copyhold tenure in its forms and incidents; but the latter is more summary in its conveyancing. In substance, however, the feu is a freehold, for the vassal can dig the mines, and exercise all the rights of absolute ownership, being subject only to the feu-duty, and incidents, and to confirmation of title.

Tenure in *frankalmoign*[1] is that by which ecclesiastical and charitable corporations hold their property, and was excepted from the operation of the statute 12 Ch. II. c. 24, which abolished the other tenures. The lands of the church are held under this tenure, to which there are no incidents, not even fealty.[a]

CHAPTER III.

FREEHOLDS OF INHERITANCE.

I. ESTATES IN FEE-SIMPLE.

II. ESTATES TAIL.

17. Real property, as already stated, is held substantially on two[2] kinds of tenure, viz. Freehold and Copyhold. First, as to Freeholds.

18. *Subinfeudation.*—The statute of *Quia Emptores*, 18 Ed. I. c. 1, having prohibited subinfeudation,[3] the tenant then in pos-

[a] 2 Bl. Com. 101.

IN SCOTLAND.

[1] This holding, called *mortification*, was abolished, and the lands declared by statute to belong to the crown, 1587, c. 29. Lands of hospitals and charities are now held by trustees in feu or blench of the crown; Ersk. ii. 4, 8.

[2] Only one, called the feudal tenure.

[3] *Contra;* subinfeudation, not being prohibited by any statute, may go on *ad infinitum;* though it is sometimes prohibited by the contract between the superior and vassal. *Campbell* v. *Dunn*, 2 S. D. 341; 1 W. S. 690; 6 S. D. 679; 3 Ross L. C. 291. The superior, who holds of the crown, has the *dominium directum*, and his vassal, or the feuholder, has the *dominium utile.* Though each vassal can constitute himself a mediate superior to sub-vassals, yet the superior cannot create an intermediate superiority between himself and his own vassal, without the latter's consent. See *Gardner* v. *Scott*, 2 Bell's Ap. 129. The theory is, that the feudal estate must always be full, *i.e.*, the superior is entitled to have a vassal, and the vassal a superior; which means, practically, that the superior is entitled to perquisites or incidents from the vassal. The feu-duty is generally a money-payment by way of rent; and there are various casualties or incidents. See *post.* See the history of superior and vassal, discussed in *Stirling* v. *Ewart*, 3 Bell's Ap. 128.

session could thereafter sell his land in no other way than so as to put the purchaser exactly in his own place, *i. e.*, he alienated his entire right, reserving nothing. All tenants at that time held either directly of the crown, or of some lord, who held directly of the crown. To this day, all freeholds are still in theory held of the crown, or in a few cases, which seldom occur, are held of the lord, whose ancestors can be traced up to the time of the statute as holding of the crown. In the latter case, a trifling rent, generally nominal, is strictly due, and payable to the lord by the freeholder.

19. The freehold tenure is the tenure most prevalent, and into which copyhold may be compulsorily converted.[1] See *post.*

20. *Title of freehold property.*—The freeholder or tenant in fee of a freehold of inheritance, has the largest estate in land which is known to the law.[2] He requires no grant, or renewal of grant,[3] either from the crown, or from any lord; when he sells the land, the purchaser requires no confirmation[3] by the crown or any lord—and when he dies, neither his heir,[3] nor his devisee, requires any such confirmation of title.[a] In nearly every case, he now holds directly of the crown, by the service of mere fealty, a service which is merely nominal.[b]

He has also an absolute right to the soil, and the mines to the

[a] Wright's Tenures. 2 Bl. Com. [b] Booth, 135; Co. Litt. 98*a*; Co. Lit. by Hargr. 68*b*.

IN SCOTLAND.

[1] The feudal tenure is universal, with a few trifling exceptions, and the vassal cannot compel his superior to part with his superiority, nor *vice versa*. See *post*, Ch. IX.

[2] The vassal's estate is the highest known; for though the crown may be his direct superior, he is, in that case, only a crown vassal, the distinction not being merely theoretical. See Menzies' Convey. 779; 10 & 11 Vic. c. 51; 21 & 22 Vic. c. 76, § 6, § 32.

[3] *Contra;* the vassal must always have a title from his superior, and, at each alienation, the purchaser must have a title from the superior, as well as from the vendor, to make his title perfect; and, at the vassal's death, the heir must also have a title from the superior.

So the superior is himself treated as a vassal of the crown, and requires crown charters, in the same way, on like occasions. All these titles, of course, involve expense, but some are rendered unnecessary, or reduced in length, since 1858, by 21 & 22 Vic. c. 76.

centre of the earth.[1] His right is often quaintly said to extend *a centro usque ad cœlum.*

21. *Incidents of freehold tenure.*—There are no incidents[2] whatever of freehold tenure, except in the few cases where the lord of the freehold can still be traced, and to whom a fixed rent, however small, is payable. Thus, in the latter case, at the freeholder's death, a relief of one year's[3] quit-rent is due from the heir to the lord.[a] If the freeholder dies without heirs, the land escheats not to the crown, but to the lord.[b][4] So if the freeholder is attainted for murder;[5] but if for high treason, it goes to the crown.

22. *Classification of freeholds.*—Estates of freehold are subdivided into freeholds of inheritance and freeholds for life,[6] in lands of free tenure. Freeholds of inheritance are further divided into estates in fee-simple, and estates in fee-tail.

I. ESTATES IN FEE-SIMPLE.

23. *Limitation of estate in fee-simple.*—A tenant in fee-simple is he who holds land or tenements to him and his heirs, *i.e.* his heirs-general.[c] The words "and his heirs," must be expressly inserted in the conveyance, or grant, if by deed. Thus, if the land is given to "A," without adding the words "and his heirs," A takes only an estate for life.[d][7] Hence, also, if land is given by deed "to A, then

[a] *Litt.* § 26; *Freeman* v. *Booth*, 3 Lev. 145; Co. *Lit.* by Hargr. 93 (*a*), n. 2. A heriot is also sometimes due. See *post*, Ch. IX.

[b] 2 Bl. Com. 72; Scriv. Cop. 757.

[c] Wright's Tenures.

[d] Litt. s. 1; *Wright* v. *Dowley*, 2 W. Bl. 1185.

IN SCOTLAND.

[1] So has a vassal, unless the feu-contract expressly reserve the minerals, as is sometimes the case. See *Stewart* v. *Johnson*, 19 D. B. M. 1071; *Menzies* v. *E. Breadalbane*, 2 Sh. Ap. 225.

[2] *Contra;* the casualties of superiority, on death and alienation, are often important, and the feu-duty is always payable. See *post.*

[3] So, on the vassal's death, a relief of a year's feu-duty; but it seems this is due only by stipulation; Ersk. 2, 5, 48. The practice, so to stipulate, is, however, nearly universal.

[4] *Contra;* the vassal's feu goes to the crown. Ersk. 3, 10, 2.

[5] *Contra, ibid.*

[6] A liferent is never called a freehold, but is classed with servitudes. See *post*, Ch. IV.

[7] *Contra;* a destination to "A," without more, gives A an estate in fee-simple. Bell's Pr. § 1704.

to B," without adding "and his heirs" to each, the heirs of A would not succeed before B, nor at all;[1] and it would make no difference,[2] that A's father granted the conveyance.

24. An exception to the above rule, however, exists where there is a devise to A by *will*;[3] for a devise to A without the words "and his heirs," will have the same effect as an express devise with those words, unless the contrary appears from the rest of the will.[a]

25. *Alienation of freeholds.*—An inseparable incident of an estate in fee-simple, is the absolute right of alienation.[b] The tenant may, at pleasure, and without the consent or interference of the crown, or any lord, alienate either the whole of his estate, or a smaller estate, such as an estate for life, or for years. If he alienates the whole estate, his own conveyance is the sole and sufficient title[4] of the purchaser, who thereupon holds not under him, but solely under the crown, or the vendor's lord, if any.

So the tenant may freely by will[5] devise his estate to whomsoever he chooses.[c]

26. *Alienation in Mortmain.*—There is a restriction, however, to the absolute right of alienation by will. Where the land is given for a charitable purpose, as for a school, church, hospital, etc., the Statute of Mortmain, 9 Geo. II. c. 36, makes void[6] any devise of land, or gift of money to be laid out in the purchase of land, for such purposes; and the only way of effectually conveying land for a charity, is by

[a] 1 Vic. c. 26, § 28. [b] Co. Litt. 223*a*. [c] 32 Hen. 8, c. 1, and 34 Hen. 8, c. 5.

IN SCOTLAND.

[1] The same, *ibid*, § 1704, § 1776; unless where a father gave the estate to his son, A.

[2] *Contra*, *ibid.*

[3] (There being no devise by will allowed), a *mortis causa* disposition will be so construed. Bell's Pr. § 1704.

[4] *Contra.* The purchaser may hold of the vendor, or of the superior of the vendor in the usual way, and requires the superior to confirm his title.

[5] *Contra*, only by deed. See *post*, "Succession."

[6] *Contra.* The Mortmain Act does not extend to Scotland; but it is to be observed that no land there can be devised by will, and the law of death-bed avoids deeds executed within sixty days before death in many cases. See *post*, "Succession." See an instance of a valid bequest for an hospital, *Mag. of Dundee* v. *Morris*, 29 Sc. Jur. 528, and 3 Macq. Ap. 134.

deed executed in presence of two witnesses, and enrolled in the Court of Chancery, the deed to take immediate effect, and to be executed at least twelve months before death. Yet if the testator leave money to be laid out in charitable buildings, etc., and the executors be prohibited from purchasing the site, but nevertheless obtain a site without paying for it, the bequest will be good.[a] And it will be good, if the testator direct the money to be laid out on land in Scotland, or any other country, to which the Mortmain Act does not extend; or if he gives his trustees an option so to lay it out.[b] The Mortmain Act does not extend to the colonies.[c] That act has been relaxed to a certain extent, so as to allow a conveyance, executed before one witness, though less than twelve months before death, for the purpose of giving sites for schools, and scientific and literary institutions.[d] So relaxations exist in favour of Queen Anne's Bounty[e] new churches and clerical residences.[f]

27. *Alienation to Corporations.*—In like manner, no conveyance can be made of any lands to any corporation, to be held by it for ever, unless the crown expressly grant a license[1] to the latter for that purpose.[g]

II. ESTATES TAIL.

28. *Origin of Estates Tail.*—When an estate was given to a man and the heirs of his body, there was, early in English history, a struggle as to how far the donee could be allowed to defeat the right of his children, by selling or alienating the property, and as to the right of the donor to have the reversion, when the issue of the donee became extinct. The natural tendency was in favour of allowing the father the ordinary rights of a freeholder, the chief of which was to have the power of selling. One party tried by the statute *De Donis*,

[a] *Philpott* v. *St. George's Hospital*, 6 H. L. Cas. 338.

[b] *Attorney-Gen.* v. *Mill*, 3 Russ. 328; 5 Bligh, N. S. 593.

[c] *Whicker* v. *Hume*, 7 H. L. Cas.

[d] 4 & 5 Vic. c. 38, and other statutes, down to 15 & 16 Vic. c. 49; 17 & 18 Vic. c. 112.

[e] 3 & 4 Vic. c. 20, § 5.

[f] 55 Geo. III. c. 147; 7 Geo. IV. c. 66; 14 & 15 V. c. 104.

[g] 7 & 8 W. III. c. 37.

IN SCOTLAND.

[1] *Contra;* but a superior is not bound to enter a corporation as vassal; Ersk. 2, 7, 7; Bell's Pr. § 722; unless upon terms, *Hill* v. *Merchant Co. of Edin.*, 2 Ross, L. C. 320; *Campbell* v. *Orphan Hospital*, 5 D. B. M. 1273.

Estates Tail.

or the statute of Westminster the second,[a] to prohibit the donee's right of alienation, so as to secure the descent of the estate to the children. But the ingenuity of the lawyers in favour of freedom succeeded[1] in inventing a sham action and judgment, by which the donee could easily acquire this absolute power, and the courts confirmed and sanctioned the artifice.[b] There were two modes of equal efficacy, one entitled a recovery, which was the first invention, and the other a fine, which was a later invention. After these sham processes had long existed, and grown gradually more and more complicated, the legislature at last simplified the matter by abolishing both fines and recoveries altogether, and allowing any tenant in tail, by a simple deed executed and enrolled within six months, at any time to convert his estate tail into a fee-simple.[c]

29. Taken in connection with another rule, the result of kindred technicalities, known as the *rule against perpetuities*, it is now impossible by any feat of conveyancing to tie up property beyond the life or lives of persons *in existence*, and 21 years after their decease, *plus* nine months allowed for posthumous children.[d]

[a] 13 Edw. I. c. 1.

[b] Taltarum's case, Year Book, 12 Edw. IV. 19.

[c] See as to Fines and Recoveries, and their operation, "First Real Prop. Com. Rep."

[d] See Fearne's Contingent Remainders; Lewis on Perpetuity.

IN SCOTLAND.

[1] *Contra.* The lawyers succeeded in the opposite direction in devising certain clauses to be inserted in a deed, known as prohibitory, irritant and resolutive clauses, *i. e.*, clauses prohibiting debt to be contracted, the succession to be altered, or the estate to be sold, and declaring that acts done by the heir with either of these views shall be null and void, and that the heir so acting shall forfeit the estate. Owing, however, to doubts as to whether these restrictions would be effectual, the legislature passed a statute 1685, c. 22 (Stair, ii. 3, 58; Ersk. ii. 8. 22) confirming them. The result was, that the maker of the entail could bind up his property for ever in a certain line of succession, provided only these technical clauses were inserted, and the deed was recorded in a particular register. And now, if there is a proper clause of registration, these technical clauses will be implied. 21 & 22 Vic. c. 76, § 18. As, however, the evils of tying up estates for ever, and restricting the powers of the heirs in possession, became at last intolerable, late statutes, 11 and 12 V. c. 36, and 16 and 17 V. c. 94, have been passed, enabling the heir of entail in possession, with, and in some cases without, consents of the next heirs, to bar the entail, and acquire the fee-simple.

30. *Limitation of Estate Tail.*—An estate tail comprehends every limitation to a man, and any selection of the heirs of his body. Thus, an estate to "A and the heirs of his body;" to "A and the heirs-male of his body;" to "A and the heirs-female of his body;" to "A and the heirs of his body by his wife W," etc., is an estate tail to A. And so an estate to the right heirs of A, by his wife W, is an estate tail, the person first answering the description of A's right heir taking as a purchaser.[a] As it is in the power of the tenant in tail to bar his estate tail and all the remainders, it is not very usual to insert in limitations a long series of estates in succession to different individuals, and the heirs of the body of each,[1] as, for example, to "A and the heirs of his body, remainder to B, and the heirs of his body," and so on; for the moment the estate came to A, he could convert it into a fee-simple. And the strictest kind of settlement known to the law consists in giving a life estate, or a series of life estates, to persons in being, ending with an estate tail to the child of the last; so that the fee-simple can be always acquired within 21 years at most, after the death of the last tenant for life. And in this way, the estates of great landed proprietors are kept in the family, a fresh settlement[2] being made whenever the eldest son reaches majority, and is in a position to bar the entail. By the fresh settlement, made with the concurrence of the father, who is in general the protector of the settlement, the son himself takes only an estate for life, giving an estate tail to his own eldest son, who in turn acts in the same way towards the next generation.

31. *Characteristic of limitation of estate tail.*—As the word "heirs" is necessary in a deed to create a fee-simple, so the word "body," or some other word of procreation is necessary to create an estate tail.[b] Thus, a grant or conveyance by deed to "A and his heirs-male" or "heirs-female," would give the fee-simple;[c] but

[a] *Vernon* v. *Wright*, 7 H. L. Cas. [b] 7 Rep. 40. [c] Co. Litt. 27 *a*; Cro. Eliz. 478.

IN SCOTLAND.

[1] *Contra;* this is the common case, sometimes fifty different individuals and the heirs of their bodies being inserted in the destination, one after the other.

[2] *Contra;* the deed of entail, if properly drawn, carries on the estate *ad infinitum* without the necessity of any fresh deed.

the same limitation in a will creates an estate tail.[a] And a conveyance by deed to "A and his children" would give merely a life estate[1] to A jointly with his children;[b] but in wills it is different.[c]

There is a peculiar species of estate tail seldom met with, but which may be still created by P, a person giving a tenement to "A and his wife *in frankmarriage*,"[2] such wife being a daughter or cousin of P. In such a case, without adding "heirs of their bodies," an estate tail in A and an estate tail in his wife are implied.[d]

32. *Restrictions on alienation by tenant in tail.*—Where an estate tail is given to T, the tenant in tail, D, the donor, cannot, by merely annexing to the gift a direction that T shall not contract debt, whereby the estate may be taken by his creditors, or shall not alienate the estate, prevent T from barring the entail and alienating it, for such conditions are repugnant to the estate created.[3] But D may give T an estate for life, *until* he attempt to alienate or become bankrupt or insolvent, with a limitation over on the happening of either of these events, and the limitation over will be effectual.[e]

33. *Barring an estate tail.*—The only way of barring an estate tail is by executing and enrolling a proper disentailing deed, pursuant

[a] *Lord Ossulston's* case, 3 Salk. 336; *Doe* v. *Colyear*, 11 East, 548.

[b] Co. Litt. 20; *Frogmorton* v. *Wharrey*, 2 W. Bl. 728.

[c] 2 Jarm. Wills, 327.

[d] Litt. § 17.

[e] *Lear* v. *Leggatt*, 2 Sim. 479; *Wilkinson* v. *Wilkinson*, 3 Sw. 515; *Godden* v. *Crowhurst*, 10 Sim. 612.

IN SCOTLAND.

[1] *Contra;* it would give the fee to A.

[2] This is unknown. See *post*, "Marriage."

[3] *Contra;* all these things can be done, if the deed of entail is properly prepared; and it is the chief object of an entail to do them. Three sets of clauses are necessary—1. Prohibitory clauses, declaring that the heir of entail shall not alienate the lands or contract debt, whereby the lands may be adjudged, &c., or alter the order of succession. 2. Irritant clauses, which declare that all acts or deeds of the heir, in disregard of the prohibitions, shall be null and void. 3. Resolutive clauses, which declare that the heir so acting shall forfeit the estate, in which case it passes on to the next heir. These clauses need not now be expressed *ad longum*, if there is a proper clause of registration. 21 & 22 Vic. c. 76, § 18. Numerous decisions have occurred as to whether these clauses are technically sufficient and precise; and now a defect in one prohibition makes the deed of entail ineffectual as to all the others. 11 & 12 Vict. c. 36, § 43. *Ferguson* v. *Ferguson*, 15 D. B. M. 19; *White* v. *Dempster*, 29 Sc. Jur. 391; 3 Macq. Ap. 62.

to the statute.[a] The deed must be enrolled in the Court of Chancery within six months after execution.[b] The tenant in tail cannot bar the entail by *will*, however clearly he may state his intention, nor even by contract, nor any mode short of actually executing the proper deed.[c] [1]

34. Where T, the tenant in tail, is *not in possession*, but is only tenant in tail expectant on the determination of a prior estate, for example of a life estate of C, then T requires the *consent* of C, or of some other person who has been expressly or impliedly appointed by the deed as *protector* during the continuance of the preceding estate, to execute the proper disentailing deed.[d] [2] The protector's[2] consent must be given by deed, and he can withhold it at discretion; but, even without his consent, the tenant in tail can bar his own issue. Hence it is, that under settlements of great landed proprietors, the eldest son generally requires the consent of his father, before he can bar the estate tail entirely.[e] Where the protector is *non compos mentis*, the Lord Chancellor is protector, and will refuse his consent unless for the benefit of the tenant in tail.[f]

35. Where the tenant in tail is *in possession*, he can, without any person's consent,[3] bar the entail and acquire the fee-simple. In no case does he require the consent of any of the heirs inheritable under the entail.

[a] 3 & 4 W. IV. c. 74.
[b] *Ibid*, § 41.
[c] *Ibid*, § 40.
[d] 3 & 4 W. IV. c. 74; § 32–47.
[e] See First Rep. of Real Prop. Com., 32.
[f] *Re Graydon*, 1 Mac. & G. 655.

IN SCOTLAND.

[1] The same, but he must petition the Court for leave to disentail; 11 & 12 Vic. c. 36. He may, however, sell or charge with debt, or excamb the entailed estate, and the sanction or authority of the Court may afterwards be interponed; 16 & 17 Vic. c. 94, § 5.

[2] There is no person analogous to a protector in a Scotch deed of entail; but when the consent of an heir-substitute, who is a minor, is required, the Court will appoint a guardian to consent for the latter. 11 & 12 Vic. c. 36, § 31; 16 & 17 Vic., c. 94, § 18.

[3] The heir of entail in possession will require no consent of the next heir substitute, if he himself has been born after 1848, and is of full age; so, if he himself is the only heir in existence of full age and unmarried, he requires no person's consent. But in other cases he requires the consent of the next heirs substitute, if less than three, or of the next three heirs, the heir apparent, or next heir substitute, being not less than twenty-five years of age, and free from any disability. See 11 & 12 Vic. c. 36; 16 & 17 Vic. c. 94.

Estate Tail.

36. *Estate tail may be barred without any consideration.*—From what has preceded, it follows, that if a deed give an estate to B and the heirs of his body, this being an estate tail in B, he cannot defeat the entail by will, but he can bar the estate tail by the proper deed, and then can either sell or alienate it gratuitously, or bequeath it by will.[1]

37. If A, by deed, give an estate to B and the heirs of his body, with an express remainder to C and his heirs, or with the reversion[2] (which, if there be no remainder given, would be implied) to A and his heirs, B can after, but not before[2] executing a disentailing deed, sell or convey the estate gratuitously, or devise it by will.

38. If in a similar deed it is expressly added, that B shall *not alienate* the estate,[3] this prohibition would, as already stated, be entirely void, because it is repugnant to the very nature of an estate tail.[a]

39. *Exceptions to right of barring the estate tail.*—There are two

[a] See Co. Litt. 223 *b*; 2 T. Rep. 133. If the estate is given by *will*, it is often a difficult question of construction, whether an estate tail or estate for life is actually given. See *post*, "Will" and "Devise." And see *ante*, § 32.

IN SCOTLAND.

[1] In the case of a *simple destination*, *i. e.*, a deed without the formal clauses necessary to a strict entail, though the disponee cannot bequeath the estate by will, he may dispone it gratuitously, either by an *inter vivos* or by a *mortis causa* disposition. He has indeed all the powers of an owner in fee-simple, with this difference, that if he do not dispone the estate in his lifetime, it will go to the heirs in the destination, who are heirs of provision, and not to his heir at law. But the estate will be liable in the hands of the heirs of provision for the debts of the former owner. Stair 2, 3, 59; *Edgar* v. *Maxwell*, M. 3090; 1 Cr. & S. 334; *Snodgrass* v. *Buchanan*, M. No. 1 Ap. "Service of heirs."

[2] B can, in this case, *i. e.*, in a simple destination, without any disentailing deed, convey away the estate gratuitously, notwithstanding a *clause of return*. Ersk. 3, 8, 45; D. Douglas, M. 4343; *Mackay* v. *Campbell's Trs.*, 13 S. D. 246. See next note.

[3] Formerly such a prohibition would effectually prevent B gratuitously alienating. *E. Callender* v. *Hamilton*, M. 15,479; *Ure* v. *E. Crawford*, M. 4315; *Stewart* v. *Fullerton*, 4 W. S. 196; *Bruce* v. *Bruce*, 4 W. S. 240; *D. Queensberry* v. *M. Queensberry*, 4 W. S. 254. *Carrick* v. *Buchanan*, 3 Bell's Ap. 342. But it would be void against purchasers and creditors. And now, nothing but a regular deed of entail with the fettering clauses, or their equivalent—a clause of registration (*post*, § 52, n. 3), will be effectual to prevent the disponee alienating. *Baillie* v. *Cochrane*, 29 Sc. Jur. 336; 2 Macq. Ap. 258; *White* v. *Dempster*, 29 Sc. Jur. 391; 3 Macq Ap. 62.

exceptions to the right of the tenant in tail to bar the entail. One is where he is *tenant in tail after possibility of issue extinct*;[1] as, for example, where the estate was to T and the heirs of his body by his wife Mary. If Mary is dead without issue, he cannot bar the entail, the case being excepted from the late statute.[a]

40. Another exception is where, under a grant or settlement made before 1834, a woman was made tenant in tail *ex provisione viri, i.e.*, of lands of her husband or coming from his ancestors. After the husband's decease the widow cannot bar the entail without the assent of the next heirs.[b]

41. There are also exceptions to the power of a tenant in tail in possession to bar the entail, where the estates have been granted by the Crown as a reward for public services,[c] or have been created by Act of Parliament.

42. *Consequence of not barring the entail.*—Assuming that the tenant in tail in possession does not (as he is at any time entitled to do) bar the entail, then the estate goes *per formam doni* to the persons denoted by the limitation, who on succeeding have each the same power of barring the entail as the first donee in tail.[2]

43. If the tenant in tail, without barring the estate tail, sell or alienate his estate—an unusual thing—the purchaser P would have what is called a *base* or *qualified* fee, *i.e.*, P and his heirs would have

[a] 2 Bl. Com. 124. 14 Eliz. c. 8. 3 & 4 W. IV. c. 74, § 18.
[b] 11 Hen. VII. c. 20; 32 Hen. VIII. c. 36, § 2.
[c] 34 & 35 Hen. VIII. c. 20; 3 & 4 W. IV. c. 74, § 18; Cruise on Recoveries, 318.

IN SCOTLAND.

[1] The last of the series of heirs of entail in possession, after whom the estate is destined to "heirs whatsoever of the entailer," or to his own heirs whatsoever, acquires the fee, and his fetters fall off. *Colville* v. *Colville*, 4 Bell's Ap. 248; *Mure* v. *Mure*, 3 Sh. & M'L. 236. So the entail comes to an end whenever the estate goes to heirs-portioners, and there is no provision to exclude them. *Farquharson* v. *Farquharson*, 1 D. B. M. 121; *Craig* v. *M'Culloch*, *Ibid.* 545.

[2] The donee in tail is called the institute, and all the succeeding heirs are called substitutes. The institute is not generally included under the term "heirs of entail," and, unless the fetters are imposed on him expressly, he is not bound by them, and so would be the owner in *fee-simple*. *M. Breadalbane* v. *Campbell*, 2 Rob. Ap. 109; *Macgregor* v. *Brown*, 3 Sh. & M'L. 84.

the estate so long as the tenant in tail and his issue inheritable under the entail should live, but no longer; but P's base fee might be enlarged by the tenant in tail executing a disentailing deed which would bar the remainders or reversion.[a]

44. *As to the fee in estates tail.*—So long as the estate tail exists unbarred, the inheritance is broken into different estates or interests carved out of it; the remainder being a distinct estate as well as the existing estate tail. But for the purposes of convenience, the first tenant in tail, whether in possession or succession, represents the inheritance.[b] [1]

45. *Forfeiture by a tenant in tail.*—Where a tenant in tail is guilty of high treason,[1] the estate of the traitor, for himself and his issue, is forfeited to the Crown,[c] and continues in the Crown till the issue are extinct,[2] when the lands go to the remainderman or reversioner.[d] If the tenant in tail is attainted of felony, the estate is forfeited to the Crown for his life only.[e]

46. *Creditors of tenant in tail.*—If the tenant in tail become a bankrupt, the bankruptcy bars the entail for the benefit of the creditors, so far as the bankrupt himself could have barred it.[f] [3] And the entire inheritance will pass to the assignees for the benefit of his creditors as completely as if it had been held by the bankrupt in fee-simple.

47. Whatever right the tenant in tail has may be taken in exe-

[a] Burton's Comp., § 715; 1 Prest. Shep. T. 107.

[b] *Lloyd* v. *Jones*, 9 Ves. 64; *L. Cholmely* v. *L. Clinton*, 2 Jac. & W. 7, 133.

[c] 26 Hen. VIII. c. 13, § 5; 2 Bl. Com. 118.

[d] 1 Cruise on Titles, c. 2, § 36–41.

[e] 1 Cruise on Titles, 2, c. 2, § 42.

[f] 3 & 4 W. IV. c. 74, § 56–73; 12 & 13 Vic., 106, § 208.

IN SCOTLAND.

[1] *Contra;* the fee is successively in each heir of entail in possession, who is accordingly entitled to exercise all the powers of a fiar (tenant in fee simple, E) except so far as he is restricted by the deed of entail. The entailer parts with the fee to the institute, and cannot divide it into lesser estates as in England. See *Montgomerie* v. *Eglinton*, 2 Bell's Ap. 149.

[2] So as to the heir of entail in possession and the heirs of his body, after which the estate returns to the next substitute, and so on in the old channel. *Gordon of Park's* case, M. 4731: 1 Pat. Ap. C. 508.

[3] As the heir could not bar the entail, neither does his bankruptcy.

cution by his creditors under an *elegit* during his life.[1] But issue in tail is not bound by the preceding tenant's contracts respecting the *property*, unless the former ratify them, or specially agree to be bound.[a] Moreover, the tenant in tail in possession is not bound for the debts of a deceased tenant in tail, unless a judgment, decree, rule, or order had been obtained and registered during the life of the latter, in which case the property will be liable in his successor's hands to that extent.[b] [2]

48. But the property will be bound in the hands of the donee in tail, or any tenant in tail in possession after him, for the debts of the deceased donor.[c] [3]

49. *Powers of tenant in tail in possession over estate.*—A tenant in tail in possession may, without barring the entail, cut timber for his own profit, dig mines, and commit what waste he pleases.[d] [4]

[a] 1 Jarm. & Byth. by Sweet, 579.
[b] 1 & 2 Vic., c. 110, § 13, 18.
[c] 1 & 2 Vic. c. 110; 3 & 4 W. IV. c. 104.
[d] Co. Lit. 224 *a*; 2 Bl. Com. 115.

IN SCOTLAND.

[1] So the creditors can adjudge the land, during the life of the heir of entail in possession; and if the deed of entail is not so strictly drawn as to prevent it, they may adjudge the lands absolutely. *Nairn* v. *Gray*, 15th Feb. 1810, F. C.; *Grahame* v. *Hunter*, 6 W. S. 518. See *E. Airlie* v. *Ogilvy*, 2 Macq. Ap. 260; *Baillie* v. *Cochrane*, *Ibid.* 258, and cases cited.

[2] An heir of entail's general debts cannot bind either the next heir or affect the estate, unless the deed is so imperfectly drawn as not to be a strict entail.

[3] The institute, or a substitute heir of entail after him, may be liable for the debts of the entailer, even beyond the value of the entailed estate, unless he be served heir *cum beneficio inventarii*, or with specification. Stat. 1695, c. 24; *Codrington* v. *Johnston*, 2 Sh. Ap. 118; 10 & 11 Vic. c. 47, § 1, § 25. If the heir's liability is restricted by the proper service, then, though the heir in possession is not personally bound to pay the entailer's debts, they may be made effectual against the estate. Ersk. 3, 8, 27; *Campbell* v. *Campbell*, 29th Nov. 1815, F. C.; *Kerr* v. *Turnbull*, M. 15,551; *Dickson* v. *Cunninghame*, 5 W. S. 657.

[4] *Contra*; the heir of entail in possession can only cut timber ripe for cutting, and, in general, his powers are not much greater than those of a liferenter, and are often specially restricted by the deed. M. 15,399; Cr. & St. 618; M. 15,408. See *Gordon* v. *Gordon*, 24th Jan. 1811, F.C.; *Ker* v. *Dickson*, 6 S. D. 73; *Muirhead* v. *Young's Trustees*, 30 Sc. Jur. 152. But he may open mines, for, if he cannot do so, nobody can.

Estates Tail.

50. He is empowered by statute to grant *leases*[1] by deed for a term not exceeding twenty-one years, which will be binding on the remainderman or reversioner.[a1]

51. *Issue of tenant in tail take by descent.*—The issue of the donee in tail takes the estate by descent from the donee in tail,[2] he being the last purchaser, and not by descent from the last tenant in tail.

52. *As to conditions imposed on tenant.*—As a tenant in tail in possession can at any time bar the entail, no conditions or restrictions which are repugnant to the nature of the estate, such as a prohibition to alienate, can be annexed to the grant.[b3]

53. *Deed or will creating estate tail.*—The estate tail is generally created by will[4] or marriage settlement, but it may be by any other deed.[c]

[a] 3 & 4 W. IV. c. 74, § 15, 40, 41.

[b] See ante, § 32; Third Real Prop. Com. Report, p. 30. *Taylor d. Atkyns* v. *Horde*, 1 Burr.

[c] See further as to estates tail given by will; *post* "Will," "Devise."

IN SCOTLAND.

[1] The same; 6 & 7 W. IV. c. 42; 11 & 12 Vic. c. 36, § 4, § 12. See extended powers as to granting feus and building leases, 16 & 17 Vic. c. 94. As to making improvements, 10 Geo. III. c. 51, § 9, 26; 11 & 12 Vic. c. 36, § 12, 13, 19. As to building gaols, making roads, see 59 Geo. III. c. 61; 4 Geo. IV. c. 49. As to making excambions, 11 & 12 Vic. c. 36, § 12; 16 & 17 Vic. c. 94. As to selling part to pay entailer's debts, 6 & 7 W. IV. c. 42; 11 & 12 Vic. c. 36. As to providing for wife and children by bonds, 5 Geo. IV. c. 87; 11 & 12 Vic. c. 36; 16 & 17 Vic. c. 94.

[2] *Contra;* each heir of entail is heir of provision of the immediately previous heir, and so takes by service to the latter. *Anstruther* v. *Anstruther*, 2 Sh. & M'L. 369. This is sometimes important, for the heir in possession, if the heir-at-law of the preceding heir of entail, may have to collate the estate. *Ibid.* It has been held, that, on the death of the heir of entail in possession, the succession opens to the next substitute within the meaning of the Succession Duties Act, 16 & 17 Vic. c. 51; *Lord Advocate* v. *Lord Saltoun*, 31 Sc. Jur. 76.

[3] *Contra;* there must, in a strict entail, be either express prohibitions against alienating, contracting debt, and altering the order of succession, each fenced with proper irritant and resolutive clauses, or, what is now equivalent, there must be in the deed of entail an express clause authorising registration of the deed in the register of tailzies, in which case these other clauses will be implied. 21 & 22 Vic. c. 76, § 18. These clauses are the soul of an entail, and a defect in one prohibition vitiates the whole entail. Sh. 1685. c. 22; 11 & 12 Vic. c. 36, § 14; *Urquhart* v. *Urquhart*, 1 Macq. Ap. 658; *White v. Dempster*, 29 Sc. Jur. 391; 3 Macq. Ap. 658.

[4] By a deed in the Scotch form only; but it may be by testamentary or *mortis causa* disposition.

54. *Registration of deed.*—The deed creating the entail does not require, except in the register counties, *i.e.*, York, Middlesex, and Kingston-upon-Hull, to be recorded in any register,[1] and there is no proper register in which it can be recorded.

CHAPTER IV.

FREEHOLD ESTATES NOT OF INHERITANCE.

55. An estate for life in lands is a freehold, whether the "life" be that of the tenant for life, or of some other person, called the *cestui qui vie*,[2] in which latter case the tenant is said to have an estate *pur autre vie*.[2] So a freehold may sometimes be for less than life, as where an estate is bequeathed to a widow for life, or during her widowhood, in which case her estate determines on her marrying again.[a]

An estate for life, like an inheritance, is of a feudal nature, and is given or conferred by the same feudal rights and solemnities—the same investiture or livery of seisin as fees themselves.[3] Hence the owner is said to be seised in his demesne as of freehold. The owner of the estate for life can alienate his entire interest to a purchaser.

56. *Estate pur autre vie.*—Where A has a life estate, or is the owner of a life estate, he may dispose of it to B, or to B and his heirs. If B died during A's life, formerly any person might enter and possess till A's death, in which case he was called a "general

[a] Co. Litt. 42 *a*; 2 Bl. Com. 121.

IN SCOTLAND.

[1] *Contra;* it is indispensable (stat. 1685, c. 22) to register the deed of entail in the Register of Entails, as regards creditors, though not as between heirs. *Broomfield* v. *Paterson*, M. 15,618, 14 S. D. 1033; *E. Eglinton* v. *Montgomerie*, 2 Bell's Ap. C. 149; *Norton* v. *Stirling*, 2 Macq. Ap. C. 205; 21 & 22 Vic. c. 76, § 18, *ante*, § 52.

[2] These terms not used. A liferent is considered a servitude or burden on the fee.

[3] So a liferenter, if a liferenter by constitution, requires sasine. Ersk. 2, 9, 41. But he cannot transmit his right so as to infeft another. Stair, 2, 6, 7; 3, 2, 6. He can, however, practically do the same thing by assigning his right to the rents, and giving possession, intimation being made to the fiar and to the tenants. *Flowerdew* v. *Buchan*, 13 S. D. 615; M. 836, 838.

occupant;" or if the life estate was given to B and his heirs, then B's heir could enter, and was called the "special occupant;" but now B can bequeath the estate by will.[a]

If an estate *pur autre vie, i.e.*, an estate to B for the life of A, is not bequeathed by B's will, it goes to B's executors, if there be no special occupant, and will be assets in their hands; and the surplus will go to the next of kin.[b] [1] If the estate is to B, his heirs, executors, and administrators, then the heir is preferred to the administrator.[c]

57. Where an estate *pur autre vie, i.e.*, for the life of A, is given to B and the heirs of his body, B is said to have a *quasi estate tail*, and this will descend like an ordinary estate tail, so long as A lives. But B can bar his issue and all remainders by an ordinary deed of conveyance, a deed of disentail not being necessary.[d]

58. *Ordering cestui qui vie to be produced.*—As it is the interest of B, who has an estate for the life of A, that A should live as long as possible, frauds are often committed on the reversioner or remainderman, by misrepresenting the fact of his being alive. Hence, if the remainderman, etc., has good reason to believe that A is dead, he may, on affidavit, apply to the Lord Chancellor[2] for an order on B to produce A, failing which, A shall be taken to be dead, and B, by remaining any longer in possession, shall be a trespasser.[e]

59. *How estate for life created.*—Where a conveyance by deed gives lands to "A," without adding words of inheritance such as "and his heirs," or words equivalent, A takes only an estate for life[3] in the lands.[f] But where a testator devises land by *will* to

[a] 29 Ch. II, c. 3, § 12; 1 Vic. c. 26, § 3.
[b] *Ibid;* 14 Geo. II. c. 20, § 9.
[c] *Doe* v. *Steele*, 4 Q. B. 663; *Carpenter* v. *Dunsmure*, 3 E. & B. 318.
[d] Fearne Cont. Rem. 495; *Edwards* v. *Champion*, 3 De G. M. & G. 202; *Allen* v. *Allen*, 2 Dr. & W. 307.
[e] 6 Anne, c. 18; Exp. *Grant*, 6 Ves. 512; Re *Lingen*, 12 Sim. 104.
[f] Litt. § 283; Co. Litt. 42 *a*; 2 Bl. Com. 121.

IN SCOTLAND.

[1] *Contra;* it is heritable, and goes to the heir.

[2] *Contra;* no such power in the Court.

[3] *Contra;* he takes the fee. Bell's Pr. § 1704. If he is to be limited to a liferent, it must be a conveyance expressly to "A in liferent." If the property is given to A in liferent and to the heirs of A's body, or to his children *nascituris*, in fee, the word "allenarly," or an equivalent term, must be used, as to "A for his liferent use allenarly;" *Mackintosh* v. *Gordon*, 4 Bell's Ap. 105; or a trust must be interposed; *Seton*, M. 4219; *Mein* v. *Taylor*, 4 W. S. 22.

A, then A takes the fee, unless the rest of the will imports a contrary intention.[a1]

60. Since real estate may be devised by will, it is very uncommon for A to convey the lands by deed to B and his heirs, subject to the life estate of A;[2] for a devise by will of the lands to B has the same effect. But in marriage settlements A generally conveys his lands to trustees, taking merely a life-estate, the eldest son being made tenant in tail, and in case of his decease without issue, the second son being made tenant in tail in remainder, and so on.

61. Where A, the owner of the fee, grants a life estate to B, and does not expressly give the remainder to any person, then the estate remaining after the life estate impliedly reverts to the grantor. In that case B has what is called the particular estate, and A has the reversion,[3] and is called the reversioner.

62. Where A expressly gives, after the decease of B, the remainder to C and his heirs, then C is said to have the remainder,[4] and is called the remainderman.

63. *Legal estates for life.*—There are two kinds of life estate given by the law in the case of either the husband or wife surviving the other, the latter having been seised of real estate. If a husband survives his wife, he is tenant by the curtesy[5] of England of her real estates. On the other hand, if the wife survives her husband, she has an estate in dower[6] in the lands of her husband.[b]

64. *Powers of tenant for life over the estate.*—The tenant for life,

[a] 1 Vic. c. 26, § 28.

[b] See as to these, *post*, "Marriage."

IN SCOTLAND.

[1] The same as to a deed *mortis causa*. Bell's Pr. § 1704.

[2] *Contra;* this is the usual course, since heritage cannot pass by will. A therefore, by deed, conveys the fee to B, retaining or reserving his own liferent; and this is called a "liferent by reservation." Where a liferent is given to a third party, it is called a "liferent by constitution." See, as to husband and wife, and children, *post*, "Marriage."

[3] Called respectively the fee and the fiar.

[4] Called also respectively the fee and the fiar.

[5] The same; he is courtesy-holder. See *post*, "Marriage."

[6] The same; she has terce, and is a tercer. See *post*, "Marriage."

unless restrained by covenant or agreement, is entitled to *estovers or botes, i.e.*, wood necessary to repair or burn in the house, called respectively house-bote and fire-bote, and to repair hedges and fences.[a] But the tenant for life cannot commit *waste*, either voluntary or permissive, *i.e.*, either by positively committing waste, or negatively allowing a house, etc., to fall for want of repairs. Waste consists in felling trees, destroying houses, opening mines and gravel pits, changing the course of husbandry, and destroying heir-looms, dove-houses, etc.[b] If he fell trees to repair the premises, he need not give notice [1] to the reversioner or remainderman.

65. If, however, mines have been opened, and are in operation, he may carry these on for his own profit.[c] [2] And if the timber is in such an advanced state that it would be injured by standing, the Court of Chancery [3] will grant leave to sell it, the principal of the price to belong to the reversioner or remainderman, and the interest to the tenant for life.[d]

66. If, however, the estate for life is declared to be given "*without impeachment of waste*," [4] as is often the case, the tenant for life may cut timber, open mines, and do other waste with impunity.[e] But this does not enable him to deface the family mansion, or cut down ornamental timber; for, if he does, a court of equity will re-

[a] 2 Bl. Com. 35, 122; Co. Lit. 41 *b*; *Philips* v. *Smith*, 14 M. & W. 589.
[b] 1 Cruise, Tit. 3, c. 2.
[c] Co. Lit. 54 *b*; *Coppinger* v. *Gubbins*, 3 J. & Lat. 397.
[d] *Tooker* v. *Annesly*, 5 Sim. 235; *Waldo* v. *Waldo*, 12 Sim. 107; 19 & 20 Vic. c. 120, § 2, § 11.
[e] *Dowman's* case, 9 Rep. 10 *b*; 2 Bl. Com. 283; *Waldo* v. *Waldo*, 12 Sim. 107.

IN SCOTLAND.

[1] *Contra.* *Dickson* v. *Dickson*, 2 S. D. 138; *Dingwall* v. *Duff*, 12 S. D. 216, 541; and the fiar is entitled to point out what trees are to be felled.

[2] *Contra;* he can only apply them to the repairs or use of the estate, unless the deed expressly, or by clear implication, give them absolutely. Stair 2, 3, 74; Ersk. 2, 9, 57; *Swinton* v. *D. Roxburgh*, 1 Feb. 1814, F.C.; 7 Jan. 1816, F. C.; 2 Bell's Ill. 140.

[3] *Contra;* but the liferenter may arrange with the fiar. See M. 8250; *Macalister* v. *Macalister*, 13 D. B. M. 1239.

[4] No short phrase is used, but if the deed admits of a liberal construction as to waste, the Court will adopt it.

strain him by injunction.[a] He is also entitled to all timber blown down, or timber in buildings that have been blown down.[b] [1]

67. *Drainage.*—The tenant for life may apply to Government for advances under the Drainage Act; and if the Court of Chancery think the improvements beneficial, he may charge the loan on the inheritance.[c] [2]

68. *Emblements.*—If the tenant for life should sow the land, and die before harvest, his executors are entitled to the emblements or crop.[d] [3] This is the case, where the tenancy for life determines by the act of God or of the law; but if it determines by the tenant's own act,[4] as where a widow re-marries, she is not entitled, though her lessee is.[e]

69. *Lessees at death of tenant for life.*—Where there were under-tenants or lessees of the estate held by the tenant for life, at the time of the latter's death, they had the same right to emblements, and in some cases a greater; for when the tenant for life by his or her own act terminated that life-estate, the lessee was still entitled. But their rights are now regulated by statute. When the tenant for life dies, the lessee continues in possession up to the end of the then current year, and the rent is rateably divided between the executors of the late tenant for life, and the reversioner or other person entitled as the new landlord.[f] [5] But it has been determined that the statute does not affect the interests of the heir-at-law and personal representatives of an owner in fee-simple, who dies intestate.[g] [6]

[a] *M. Downshire* v. *Sandys*, 6 Ves. 107; *Day* v. *Merry*, 16 Ves. 375; *Morris* v. *Morris*, 15 Sim. 505; *Micklethwaite* v. *Micklethwaite*, 1 De G. & J. 504.

[b] 1 Cruise, T. 3, c. 2, § 51.

[c] 8 & 9 Vic. c. 56, and other Acts; 12 & 13 Vic. c. 100; 13 & 14 Vic. c. 31; 19 & 20 Vic. c. 120.

[d] 2 Bl. Com. 122; *Graves* v. *Weld*, 5 B. & Ad. 105.

[e] Cro. Eliz. 461; 1 Roll. Abr. 727.

[f] Apportionment of Rent Act, 4 & 5 W. IV. c. 22; 11 Geo. II. c. 19, § 15; 14 & 15 Vic. c. 25, § 1.

[g] *Browne* v. *Amyot*, 3 Hare, 173.

IN SCOTLAND.

[1] He is in general entitled to ordinary, but not to extraordinary, windfalls. *Macalister*, 13 D. B. M. 1239.

[2] These Acts apply. See 13 & 14 Vic. c. 31.

[3] The same as to industrial fruits, the rule being *messis sementem sequitur*. Ersk. 2, 9, 65; 2 Bell's Ill. 142.

[4] *Contra*; this makes no difference. *Ibid.*

[5] The Apportionment Act applies. *Fordyce* v. *Brydges*, 6 Bell's Ap. 1.

[6] A different construction appears to be favoured. In the case of entailed estates, the statute has been held to regulate the interests of the next substitute heir, and the executors of a deceased heir of entail. *Baillie* v. *Lockhart*, 27 Sc. Jur. 367; 2 Macq. Ap. 258.

70. *Tenant for life giving security against waste.*—The tenant for life cannot be compelled to find bail or give security[1] against waste that may be committed; and cannot be ejected [1] for default in doing so. But if the tenant for life is about to commit waste of that kind which he is not entitled to commit, an injunction may be obtained from the Court of Chancery in most cases, when security may be ordered;[a] or an action of damages may be brought at common law in lieu of the old, but now abolished remedy, a writ of waste.[b]

71. *Tenant for life alienating.*—A tenant for life cannot dispose of a greater than his own estate in the lands. And where he attempted to do so formerly by granting a feoffment, *i. e.*, a conveyance of the fee-simple, he forfeited his estate to the person next entitled.[c] [2] But since 1845 no such effect follows.[d] [3] A tenant for life could not grant leases for terms extending beyond his own life, except expressly empowered by deed or will; but now, since 1854, tenants for life, unless the contrary is expressly stated, may grant [4] leases not exceeding twenty-one years, under certain restrictions, on applying for the consent of the Court of Chancery.[e] Sometimes a tenant for life is empowered by the Court of Chancery to convey the fee, when the concurrence of other parties cannot be obtained.[f]

72. *Tenant for life maintaining reversioner, etc.*—A tenant for life is not bound to maintain the reversioner or remainderman, however destitute the latter may be, unless the deed or will expressly direct this.[5]

[a] *Micklethwaite* v. *Micklethwaite*, 1 De G. & J. 504.
[b] 2 Bl. Com. 273; 3 & 4 W. IV. c. 27.
[c] 2 Bl. Com. 274.
[d] 8 & 9 Vic. c. 106, § 4.
[e] 19 & 20 Vic. c. 120, § 32; 21 & 22 Vic. c. 77.
[f] 1 W. IV. c. 47, § 12; 2 & 3 Vic. c. 60; see now also 13 & 14 Vic. c. 60, § 29.

IN SCOTLAND.

[1] *Contra* by stat. 1491, c. 25; 1535, c. 15; otherwise he may be excluded from possession.

[2] *Contra.* The conveyance would pass the beneficial interest of the liferenter. See *ante*, § 26, n. 3.

[3] The same at common law.

[4] *Contra;* but as to heirs of entail, see *ante*, § 50.

[5] *Contra.* It seems the liferenter must aliment the apparent heir and fiar when destitute. Stat. 1491, c. 25; Ersk. 2, 9, 62; M. 383, *et seq.* But it is doubtful, if this doctrine would now be acted upon, after what fell from the Law Lords in *Maidment* v. *Landers*, 6 Dow, 257, and *Maule* v. *Maule*, 1 W. S. 266.

CHAPTER V.

ESTATES LESS THAN FREEHOLD.

73. Estates less than freehold are divided into estates for years, estates at will, and estates by sufferance.

73. *Estate for years.*—An estate for years is a contract for the possession of lands for some certain time, usually, though not necessarily, exceeding one year. However long may be the term, as for 1000 years, the estate of the termor is a mere chattel, while a life estate is a freehold. The former goes to the executor[1] of the deceased owner; and so does the latter since 1838, if it is an estate *pur autre vie.*[a]

74. When an annual rent is reserved by the grantor of the term, the term in that case seldom exceeding 99 years, the relation created is that of landlord and tenant.[b]

75. *Terms of years.*—But terms are often created by settlements, wills, and mortgage-deeds, where no rent is reserved, and the term in that case may, and frequently does, extend to a thousand or other large number of years, the object being to raise money or secure the payment of money in certain events, on the satisfaction of which the term ceases by a proviso for *cesser.*[2] In such cases, the legal seisin and ownership of the land remain as before, subject to this chattel interest. If such a term be assigned to one who has in his own right a freehold estate in the same lands, the term often merges in the freehold, and vanishes.[c] Sometimes, until lately, upon a sale, the term, instead of ceasing, was kept on foot by being assigned in trust to trustees to attend the inheritance, in order to protect the purchaser against secret incumbrances.[d]

[a] Wms. Exec. 1511.
[b] See *post*, ch. XV.
[c] 3 Prest. Conv. 219; *Doe d. Bligh* v. *Pett*, 11 A. & E. 842.
[d] 3 Prest. Conv. 460; abolished since 1845; 8 & 9 Vic. c. 112; see *post*, "Ch. VII. Estates in remainder," etc.

IN SCOTLAND.

[1] *Contra.* It is heritable, and goes to the heir.
[2] *Contra.* These "terms of years" are quite unknown in conveyancing.

76. *Tenancy at will.*—A tenancy at will, which is rare, is an estate in lands let by one to another, to hold at the will of the lessor, or at the will of both parties, in which case either party can determine the tenancy at any time. In doubtful cases, the Courts presume that a tenancy from year to year was intended, and not a tenancy at will.[a]

77. *Tenancy on sufferance.*—An estate at sufferance is where, a lease or other particular estate, such as an estate *pur autre vie*, having ended, the tenant continues the possession without agreement.[b] In the case of a lease for a term of years having thus determined, there is no implied renewal of the lease for one year.[c] [1]

CHAPTER VI.

ESTATES ON CONDITION, MORTGAGES, ETC.

78. Estates held on condition do not constitute a separate class of estates, the conditions being only qualifications of the estate to which they are annexed. Some of these are better known under the name of mortgages, legal or equitable. As connected with the same subject, restrictions are sometimes put on the purchasers or grantees of certain estates, and these may be first noticed.

79. *Restrictions as to use of lands sold, etc.*—Estates on condition are generally created under a will or settlement, and are unusual in purchase deeds, except where a lesser estate, as a term for years or life, is created. Where an estate in fee-simple is sold, as the vendor cannot create any tenure between himself and the vendee, the usual way in which restrictions are put on the use to be made of the

[a] *Doe* v. *Cox*, 11 Q. B. 122; see also *post*, "Landlord and Tenant."

[b] Co. Litt. 57 *b*, 271 *a*.

[c] See *post*, "Landlord and Tenant."

IN SCOTLAND.

[1] *Contra;* a tenancy from year to year arises by tacit relocation. See *post*, Ch. XV.

land, is by means of covenants[1] on the part of the vendee. In such cases the party is always bound by his own covenant; but in the event of alienation, difficulties often arise as to whether and how far the alienee is bound, to the same extent at least, without notice.

80. *What covenants occasionally entered into on alienation.*—The covenants occasionally entered into by a vendee of the estate in fee-simple, may be divided into three. *First*, such as relate to the interests possessed or acquired by the covenantee in the purchased land, independently of the covenant, as a covenant to pay a rent-charge issuing out of the land, or to maintain a road over it. It is not clearly settled whether this class of covenants runs with the land, *i.e.*, could be enforced against an alienee of the covenantor.[a] [2]

81. *Secondly*, Such covenants as are not connected with any interests in the purchased land, but which restrict or limit its mode of enjoyment by the purchaser and his representatives, as a covenant, that the land shall not be built upon, or be built upon only in a particular manner. As to these it is doubtful, whether there is any remedy against the alienee of the purchaser without notice.[b] But if he has notice, a court of equity will generally enforce the covenant against him by injunction.[c]

82. *Thirdly*, Covenants relating to the custody and production of

[a] Third Report Real Prop. Com. 53; see Sugden, V. & P. 465 *et seq.*; Dart, V. & P. 499.

[b] Dart's V. & P. 500.

[c] *Whatman* v. *Gibson*, 9 Sim. 196; *Tulk* v. *Moxhay*, 11 Beav. 571; *Mann* v. *Stephens*, 15 Sim. 377.

IN SCOTLAND.

[1] This is generally done by inserting *conditions* in the feu-charter or contract, because the vendor can create a tenure between himself and the vendee; see *ante*, § 18. Similar difficulties arise, on alienation of these, as to whether singular successors are bound by the conditions or not.

[2] The practice is for the superior, in granting a charter, to make the grant on certain conditions. A usual condition is that of pre-emption, *i.e.*, the superior is to have the first refusal of the lands, if the vassal should sell. It seems this condition is valid against singular successors if aptly expressed. See *Preston* v. *L. Dundonald's Crs.* 6 Mar. 1805, F. C.; 4 Pat. Ap. 331; *Tailors of Aberdeen* v. *Coutts*, 1 Rob. Ap. C. 321; 3 Ross L. C. 269; *E. Mar* v. *Ramsay*, 1 D. B. M. 116; *Lumsden* v. *Stewart*, 3 D. B. M. 1199; 5 D. B. M. 501; *Campbell* v. *Dun*, 6 S. D. 679; 3 Ross L. C. 291.

Another condition usual is in the form of a prohibition to sub-feu, which seems to be effectual against singular successors. See *Tailors of Aberdeen* v. *Coutts*, 1 Rob. Ap. 321; 1 Jur. Styles 25 (4th ed.)

title-deeds. It seems doubtful whether an alienee without notice can be affected unless he has the estate of the original covenantor ; [a] but an alienee with notice will be bound in a court of equity.[b]

83. In the case of covenants of the kind above mentioned, as there is no register, where the title-deeds may be examined, the purchaser from the vendee cannot be affected by the circumstance of these covenants appearing *ex facie* of the title ; [1] and specific performance will not be enforced against such purchaser.[c]

84. *Liability on covenant.*—In all cases the purchaser, when he is the covenantor, is bound, as well as his heirs and executors (provided the the heirs are named, which is usual), and is liable to an action of damages for a breach of the covenant, after he has parted with the property. This is so, whether the alienee of the covenantor is bound or not.[2]

85. *Conditions, precedent and subsequent.*—In estates held upon express conditions, the conditions are either precedent or subsequent. Precedent conditions are such as must happen to be performed before the estate vests, or is created, etc. ; subsequent are those that defeat an estate already vested, etc.[3] Hence, if the condition is impossible, immoral, or against public policy, the consequences are very different ; in the former case such a condition may prevent the estate ever vesting ; in the latter it will have no power to defeat an estate already vested, and is simply void.[d]

86. *Repugnant conditions.*—Some conditions are said to be re-

[a] Dart's V. & P. 502.
[b] Sugd. V. & P. 474.
[c] *Potter* v. *Parry*, 13 Jan. 1859, V. C. K.
[d] Co. Litt. 206. See *Egerton* v. *Brownlow*, 4 H. L. Cas. 182.

IN SCOTLAND.

[1] Where the condition is apparent on the sasine and record, it sometimes binds a purchaser from the vassal's heir. The superior, in such cases, refuses an entry to the vassal's heir, unless the condition is put in the title, but he cannot prevent a creditor or disponee of the vassal from taking the land, discharged of the condition. See Bell's Com. by Shaw, 748, *et seq.* ; *Baird* v. *Mitchell*, 8 D. B. M. 464 ; 13 D. B. M. 982.

[2] The same. The Court of Session had held *contra* in a series of cases, but these were reversed by the House of Lords. *Miller* v. *Small*, 25 Sc. Jur. 334 ; 1 Macq. Ap. 345 ; *Royal Bank of Scotland* v. *Gardyne*, 25 Sc. Jur. 399 ; 1 Macq. Ap. 358 ; *Jack* v. *Hay*, 26 Sc. Jur. 643 ; 1 Macq. Ap. 526 ; *Elmsley* v. *Brown*, 27 Sc. Jur. 346 ; 2 Macq. Ap. 40.

[3] The same. There are also conditions suspensive or suspending, and resolutive or dissolving. A condition is called potestative, when it is in the party's own power to perform it ; and he cannot set up in defence his own omission to exercise such power. See *Edin. P. & D. R. Co.* v. *Phillip*, 29 Sc. Jur. 242.

pugnant[1] to the estate, to which they are annexed. Thus, where an estate in fee-simple is conveyed or granted to A and his heirs, but on condition that A will not alienate it. This condition is simply void. So as to a like condition, annexed to an estate tail.

87. *Estates upon conditions implied.*—Sometimes a condition is implied, as where an office for life, which in that case is a freehold, is granted to a man, it is implied that he will duly execute it; and on breach of the condition, the grantor and his heirs can oust him.[a] Most conditions, however, are express.[2]

MORTGAGES.

89. *Generally.*—A mortgage is a security created by means of a transfer by a debtor to his creditor of the legal ownership of the land, subject to be defeated on payment of the debt. Deeds which substantially operate as mortgages, are construed as mortgages, and the parties are entitled to the same relative rights, unless these are restricted or varied by the deed.[b] So as to a deed which *ex facie* imports an absolute purchase,[3] but which shows that the possession was to remain unchanged, and the vendor was to account for the rents, and retain only a sum equal to interest.[c]

90. *Ordinary form of mortgage deed.*—The usual form[4] of a

[a] 2 Bl. Com. 152.
[b] *Bell* v. *Carter*, 17 Beav. 11.
[c] 2 Spence Eq. Jur. 620, *et seq.*; Coote on Mortg. 3d ed.

IN SCOTLAND.

[1] These terms are not used, but the principle is the same, with this qualification, that the prohibition to alienate may be made effectual by a proper deed of entail. See *ante*, "Estates tail," § 32, 36, 37.

[2] As to the well-known implied condition, viz., *conditio si sine liberis decesserit*, and how far it prevails, see *post*, "Wills" and "Marriage."

[3] The same as to conveyances *ex facie* absolute. See *Reid* v. *Lyon*, 6 W. S. 114; *Scottish Union Company* v. *D. Queensberry*, 1 Bell's Ap. 183.

[4] The form of the bond and disposition in security, which is now shortened as authorised by statute 10 & 11 Vic. c. 50, consists of an obligation of A, the granter, and his heirs, etc., to pay (covenant to pay) the principal at a certain day, with interest, and a liquidated penalty of one-fifth more on default. And in security A dispones to B redeemably the lands, but if the lands are sold under the power of sale, then irredeemably. Then there is an assignation of the rents and titles, a power of sale, and a consent to registration in the register. See the stats. 8 & 9 Vic. c. 31, § 1; 10 & 11 Vic. c. 50; 17 & 18 Vic. c. 62. The penalty is inserted merely to cover costs, to which it is always restricted.

mortgage deed consists of an absolute conveyance of the fee by A to B and his heirs for ever; subject to a proviso, that on payment of a certain sum on a certain day, B shall reconvey to A; with a further proviso, that A may hold the land till default in payment; with a power to B in case of default to sell the land without further notice, and pay himself and account for the surplus; and, finally, there is a covenant by A, his heirs and executors, etc., absolutely to pay to B the sum due.

91. *Old forms of mortgage deeds.*—The form, of which the substance has been already stated, is that which has now long prevailed. And there is no other form of sufficient importance to require mention.[1]

92. *The fee in the mortgagee.*—A mortgage is a conveyance of the estate in fee[2] to the lender or creditor, subject to the borrower's right to have it reconveyed on payment of the loan.

93. *Completion of mortgagee's title.*—The mortgage deed, when executed, completes the mortgagee's title; and he does not require to take seisin.[3] But, as afterwards stated, he may enter into actual possession, a position which confers advantages.

94. Nor does the mortgagee require to register[4] his mortgage

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IN SCOTLAND.

[1] The change has been more gradual as to two or three forms. But that which is now in general use is the bond and disposition in security, which has superseded nearly all the others. It is to this form that the notices following bear reference.

The old forms, which have been superseded by the bond and disposition in security were wadset, (resembling a Welsh mortgage in E.); infeftment of annual rent (rent charge in E.); and absolute disposition with backbond (sale with right of re-purchase, which perhaps more nearly resembled the present mortgage in E. than any other).

[2] *Contra;* the fee remains in the debtor, and the creditor has an heritable burden only. The debtor retains what is called the radical right, the creditor having what is called a real security.

[3] *Contra;* he required, till 1847, to obtain infeftment, but now, as a substitute, he may register the bond and disposition in the Register of Sasines. See 10 & 11 Vic. c. 50; 17 & 18 Vic. c. 62; 20 & 21 Vic. c. 19, § 8. This makes his title complete, and gives him priority over all other bondholders not similarly registered.

[4] *Contra.* See last note. The test of priority is the date of entry in the office minute-book, *i.e.*, the time at which the deed is given in for registration.

deed in any register; and there is no register for the purpose. But there is an exception in the register counties, viz., Middlesex, the three Ridings of York, and Kingston-upon-Hull;[a] for unless registered in those places respectively, the deed will be void against subsequent purchasers and mortgagees for value.

95. *Assignment of mortgage.*—The mortgagee may assign his mortgage, and this is an assignment of the debt.[1] No notice requires to be given to the mortgagor;[b] but it is prudent to make inquiry, for the assignee takes, subject to the state of the account between the mortgagee and mortgagor. The assignee, *i. e.*, the purchaser of the mortgage, in general can claim against the mortgagor the full amount of what is due, for he takes the risk.[c] But if the purchaser is the heir-at-law or trustee of the mortgagor, or in confidential relations with him, then such purchaser can only claim what he paid for the mortgage, unless he bought it to protect some other incumbrance.[d]

96. The assignee of a mortgage does not require to register the deed of assignment,[2] subject to the exceptions above mentioned in § 94.

97. *Future advances.*—A legal mortgage does not cover future advances,[3] though these were made on a parole agreement to that effect.[e] But an equitable mortgage may, if such advances were made on the faith of it.[f] Hence future advances are usually covered by that equitable mortgage called a deposit of title-deeds.[g] [4]

[a] 2 & 3 Anne, c. 4; 5 Anne, c. 18; 6 Anne, c. 35; 7 Anne, c. 20; 8 Geo. II. c. 6.
[b] 2 Spence's Eq. Jur. 655; Sugd. Conc. V. 137.
[c] *Davis* v. *Barrett*, 14 Beav. 542; *Dobson* v. *Land*, 8 Hare, 216.
[d] 2 Spence's Eq. Jur. 657, 739.
[e] Exp. Hooper, 1 Mer. 7; see also 2 Atk. 348.
[f] 2 Spence's Eq. Jur. 781.
[g] See *post*, § 120.

IN SCOTLAND.

[1] Such a deed is called an assignation or translation of the bond, according as the assignation is by the grantee or his assignees.

[2] *Contra;* the assignation or conveyance must be registered in the Register of Sasines, and the order of such registration is the order of priority of such securities. 8 & 9 Vic. c. 31, § 5, 6.

[3] *Contra;* provided the security specify a definite maximum sum, which must not exceed the principal sum to be advanced, with three years' interest thereon at 5 per cent. Stat. 1696, § 5; 19 & 20 Vic. c. 91, § 7; 19 & 20 Vic. c. 79, § 2. This is known as the security for a loan by way of cash credit.

[4] *Contra;* this is not known See *post*, § 123.

Mortgages.

98. *What arrears of interest recoverable.*—In general, the statute of limitations prevents more than six years' arrears of interest from being recovered by action, unless where there is a covenant to pay, as is usual, in which case twenty years'[1] interest may be recovered.[a] The mortgagee may add to his debt the expense of necessary repairs, and other necessary charges connected with the collection of rents.

99. *Custody of title-deeds on a mortgage.*—The mortgagee is entitled to the custody and possession of the title-deeds,[2] which are his chief protection. And he is not bound to produce them to the mortgagor or any person claiming under the latter, until the principal and interest are paid.[b] For if they were left in the mortgagor's hands, he might make a second mortgage by depositing them with a third party, or otherwise.

100. If a mortgagor twice mortgage his lands, concealing the former mortgage from the second mortgagee, he was declared by statute to lose the equity of redemption.[c][3] But practically this enactment is inoperative.[d]

101. *Nature of mortgagee's estate.*—The mortgagee's estate becomes absolute at law after the time of payment has passed, and there has been default; but even then, if an action of ejectment be brought by the mortgagee in a court of law, the action may generally be stayed on payment of the principal debt and costs.[e] When, however, the mortgagor has ceased to be in possession, and default has taken place, the estate of the mortgagee is absolute. In courts of equity, nevertheless, the estate of the mortgagee is still deemed a mere

[a] 3 & 4 W. IV. c. 27, § 42; 3 & 4 W. IV. c. 42, § 3.
[b] 2 Spence's Eq. Jur. 655; Coote, 345.
[c] 4 & 5 W. III. c. 16.
[d] *Ibid*, § 4.
[e] 15 & 16 Vic. c. 76, § 216, 220.

IN SCOTLAND.

[1] Forty years' interest in all cases.

[2] *Contra;* but after the time of payment he is entitled to demand inspection of them; *M'Neill* v. *Blair*, 14 S. D. 14; *Malcolm* v. *Carmichael*, 16 D. B. M. 825. And sometimes it is stipulated, that they should be placed in neutral custody; *Hamilton* v. *Brown*, 1 D. B. M. 725.

[3] *Contra;* a second bondholder can always see a prior bond in the register, and if it is not registered, he gets priority by registering his own.

security during the prescriptive period,[1] and may be redeemed by the mortgagor on payment of principal, interest, and costs.

102. The fee, being in the mortgagee, descends to his heir-at-law, or may be devised by will to a devisee, neither of whom, however, is generally entitled to the debt, but each is a mere trustee for the executor;[2] and the fee-simple is assets in the hands of the heir or devisee for the purpose of getting in and paying the debt due to the executor.[a]

103. When the mortgagee dies, the fee vests *eo instante* in his heir or devisee, who, however, in general is not entitled to receive the money due thereon, which belongs to the executor, as already stated.[3]

104. *Notice on paying off mortgage debt.*—If the mortgage debt is not paid at the time appointed in the deed, the mortgagee is entitled to six months' notice previous to its being paid off, unless he has taken steps to compel payment, or the deed stipulates to the contrary, such notice being presumed to be necessary to enable him to look out for a fresh security.[b 4]

105. *Defective mortgage deed.*—Where a person purports to make a mortgage, but it is defective, a court of equity[5] will order a further assurance to be made.[c] Such a mortgagee, however, would be postponed to another subsequent mortgagee, who, without notice, lent

[a] *Noy* v. *Ellis*, 2 Ch. Ca. 220; *Smith* v. *Smoult*, 1 Ch. Ca. 88; 2 Spence's Eq. Jur. 296.

[b] *Shrapnell* v. *Blake*, 2 Eq. Ca. Abr. 603, § 34.

[c] 2 Spence's Eq. Jur. 639.

IN SCOTLAND.

[1] *Contra;* the court being a court of both law and equity, there are no such conflicting views, and the deed expresses that the disposition is redeemable; *i. e.*, the title of the creditor never becomes absolute on mere default of payment.

[2] *Contra;* the fee does not go to the creditor or bondholder, but the security is heritable, and it, and the money due thereon go to the heir. They generally remain heritable till payment, when the sum becomes moveable. Ersk. 2, 2, 5, *et seq.* M. 5519.

[3] *Contra;* the heir of the bondholder or creditor must get a writ of acknowledgment from the debtor or owner of the fee, and this writ must be registered, or he may get a notarial instrument, which must also be registered; 8 & 9 Vic. c. 31, § 2, 4. It is only after registration that the heir's title is complete.

[4] *Contra;* a reasonable time is not defined.

[5] *Contra;* this seems never to be done. But if the debtor was under an obligation to grant to his creditor a valid heritable security, the Court will, in an action of implement, compel him to do so.

money on the land, and got a valid mortgage. But as regards statutory mortgagees, later than the defective mortgage deed, the effect might be different, as these are considered volunteers.[a]

106. *Implied powers of mortgagee.*—There is now implied in all mortgage deeds, after a year from the time of payment of principal, or after six months' arrears of interest unpaid, a power to sell on giving six months' notice;[b] also, where the party bound by the deed has omitted to insure, a power to insure and deduct the premiums paid; also a power to appoint a receiver.[1] But a power to sell inserted in the deed will still govern the relations of the parties, and may often be advantageous.

107. *Mortgagee's power of distress.*—The mortgagee who is not in possession, has no right to distrain[2] the goods upon the land mortgaged by way of payment of interest or otherwise. But when he is in possession, he has all the rights of the mortgagor and a landlord, subject, however, to his accounting for the rents and profits.

108. *Right to enter into possession, etc.*—The mortgagee is entitled to enter into possession, and on notice, to receive the rents from tenants. He cannot eject tenants occupying under leases made by the mortgagor; but they, on notice, must at their peril attorn to him, and they usually sign an acknowledgment of attornment, thus admit-

[a] 2 Spence's Eq. Jur. 639, 649. [b] 23 & 24 Vic. c. 145, § 11, 13.

IN SCOTLAND.

[1] *Contra.* No such powers are implied. A power of sale is, however, usually inserted, and is part of the form given by 10 & 11 Vic. c. 50. Reasonable notice, even though not stipulated, must be given to the debtor; Hume's Dec. 657, 720. The seller can give a purchaser a good title, but the powers must be strictly pursued. See *Wilson* v. *Stirling*, 8 D. B. M. 1261; Bell's Com. by Shaw, 912, *et seq.*; *Grieve* v. *Wilson*, 6 W. S. 543. The creditor cannot charge the estate with fire-insurance; *Pollock* v. *Marwick*, 31 Sc. Jur. 671.

[2] *Contra.* The creditor can do this by *poinding the ground*, but this is an action rather than an execution, and must be commenced by summons and end with decree, after which letters of poinding issue; Ersk. 4, 1, 11. As to the origin and history of this process, see 2 Ross's Lect. 392; *French* v. *Marshall*, 2 W. S. 71. The creditor can only poind a tenant's goods to the extent of rent unpaid; *Brown* v. *Scott*, 32 Sc. Jur. 110; *Campbell* v. *Paul*, 13 Jan. 1835.

ting that he is their landlord, and pay rent,[1] and he may distrain their goods accordingly. Moreover, the mortgagee, though in possession, cannot, without an absolute necessity, make a lease of the lands which will bind the mortgagor.[a] The mortgagee must afterwards account to the mortgagor for all the rents.[b]

109. The mortgagee, if the mortgagor is in possession, and refuses to deliver it up, can only proceed by action of ejectment to obtain possession. The mortgagor, after default in payment, is only a tenant at will to the mortgagee.[c][2]

110. The mortgagee is not allowed to obtain any advantage out of his security beyond payment of principal and interest; and a stipulation that interest, if unpaid, shall be converted into principal, since the repeal of the usury laws, seems now no longer liable to objection.[d][3] Formerly, also, a court of equity would not give effect to an agreement to raise the interest, in the event of its being unpaid, though the same result could always be obtained by fixing on a high interest, and providing for an abatement on punctual payment.[e]

111. *Remedies of mortgagee.*—The mortgagee, where he does not exercise his power to sell, can at any time, after default in paying the principal or interest, file a bill for foreclosure in the Court of Chancery, which is the usual remedy.[f][4] And the Court, in

[a] L. St. Leonards, H. B. 94.
[b] Story's Eq. Jur. 1016 *et seq.*; 2 Spence's Eq. Jur. 642; Coote on Mortg. 332.
[c] *Keech* v. *Hall*, Doug. 21; *Doe d. Roby* v. *Maisey*, 8 B. & C. 767; *Doe d. Fisher* v. *Giles*, 5 Bing. 421.
[d] 2 Spence's Eq. Jur. 628, 656; see Lord St. Leonards, H. B. 92.
[e] 2 Spence, 631; Coote, 44.
[f] Story's Eq. Jur. § 1026.

IN SCOTLAND.

[1] So he may enter into possession, but he must first get a decree in an action of maills and duties, before he can sequestrate (distrain E.); *Railton* v. *Muirhead*, 12 S. D. 757; *Macfarlane* v. *Campbell*, 29 Sc. Jur. 290.

[2] By action of maills and duties he can also get a possessory judgment (recover by ejectment, E.). See *Russell's Trustees* v. *Mudie*, 30 Sc. Jur. 77.

[3] The law is regulated by the same statute.

[4] *Contra.* The usual remedy is an action of judicial sale, *i. e.*, a sale under a decree of the Court. But the heritable creditor may lead an adjudication of the lands, and acquire an absolute title by a "decree of expiry of the legal," the term "legal" denoting the legal time, viz., ten years, within, but not after, which the debtor may have a redemption of the adjudication.

such suit may, in its discretion, direct a sale.[a] Such sale does not alter the relative rights of the incumbrancers.[b]

112. The suit of foreclosure must be brought within twenty years[1] after the right to bring it first accrued, or after the last payment of interest.[c] Even after decree of foreclosure, however, a court of equity will sometimes open up the decree.[d] In a foreclosure suit, the Court of Chancery fixes a day for payment of the debt, but on good reason shown will postpone it more than once.[e]

113. *Concurrent remedies of mortgagee.*—The mortgagee may pursue all his remedies at one and the same time. Thus, he may file a bill of foreclosure; he may, if there is a power of sale, proceed to sell; he may, if there is a covenant to pay, sue the mortgagor in a court of law; and he may take possession of the estate.[f][2] But a court of equity confines the effect of some of these remedies, when the others are effectual or *pro tanto*.

114. *Tacking of mortgages.*—In general, mortgages, as well as equitable charges, such as registered judgments, etc., rank according to their dates. But if a third mortgagee who became so, without notice of a second incumbrance, purchase the first mortgage or other charge, even after notice of the second mortgage, so as to acquire the legal title, and if he holds them both in his own right, he can tack the one to the other, and so obtain priority for the third mortgage over the second mortgagee.[g][3] This is on the principle, that, where the equities are equal, the law shall prevail. A first mortgagee may also some-

[a] 15 & 16 Vic. c. 86.
[b] 2 Spence's Eq. Jur. 678.
[c] 3 & 4 W. IV. c. 27, § 2; 7 W. IV. & 1 Vic. c. 28.
[d] Coote, 496.
[e] *Nanny* v. *Edwards*, 4 Russ. 124; *Eyre* v. *Hanson*, 2 Beav. 478.
[f] 2 Spence's Eq. Jur. 634, 682; *Burnell* v. *Martin*, Doug. 417; *Barker* v. *Smack*, 3 Beav. 64; *Cockell* v. *Bacon*, 16 Beav. 158; *Lockhart* v. *Hardy*, 9 Beav. 349.
[g] *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 491.

IN SCOTLAND.

[1] The remedy, such as it is, may be had within forty years.

[2] He can poind the ground, and raise either an action of maills and duties, or of judicial sale.

[3] This result is not possible, owing to the necessity of registration,—registration being the sole test of priority. If a second bondholder duly register his bond, he cannot be postponed by a third registered bondholder getting an assignation of the first bond. See *Mackenzie* v. *Orr*, M'L. & R. 117.

times be postponed to a second mortgagee, if he has, by gross negligence, allowed the mortgagor to retain the title-deeds.[a] Sometimes also, if a first mortgagee lend further money on another mortgage without notice of a mesne mortgage, he may retain the property against the mesne mortgagee, till both are paid.[b]

115. *Extinguishment of mortgage debt.*—A mortgage debt may be extinguished by the mortgagee cancelling the deed; but the legal estate in the lands must still be reconveyed by deed, either by the mortgagee or his heir; or if the mortgage debt is due to the executor, then by the executor, or by a vesting order of the Court of Chancery, which may be made where the heir is abroad or refuses.[c] [1] So payment extinguishes the debt, but a reconveyance is still necessary. If the mortgagee will not reconvey upon payment of the principal and interest, the mortgagor may file a bill to redeem in a court of equity.

116. *Costs of mortgage.*—In the absence of special agreement, the mortgagor pays all the costs[2] of the transaction, the mortgagee's solicitor examining the title and preparing the draft of the deed at the mortgagor's expense.

117. *Mortgagor's estate and rights.*—The mortgagor, whether he continues in possession or not, has the equity or right of redemption, which is an inseparable incident to a mortgage, and would exist though there was an express agreement that the estate should not be redeemable.[d]

118. The equity of redemption is an estate, and descends to the heir-at-law of the mortgagor, but the onus of paying the money lay primarily upon the executor until 1854; so that the executor of persons dying before that date was bound to pay off the debt, that the heir might hold the land unencumbered. Now, however, unless the

[a] See *Colyer* v. *Finch*, 5 H. L. 905; *Herrick* v. *Attwood*, 27 L. J. 121, Ch.

[b] Story's Eq, Jur. 417; 2 Spence, 721.

[c] 8 & 9 Vic. c. 106, § 1; 13 & 14 Vic. c. 60, § 19, § 20.

[d] Story's Eq. Jur. § 1019 *et seq.*; 2 Spence, 644.

IN SCOTLAND.

[1] No reconveyance is necessary, but only a discharge, which may be in a statutory form, and must be registered in the Register of Sasines. 8 & 9 Vic. c. 31, § 8.

[2] The debtor's solicitor prepares the bond, and the debtor pays for it. See *Reddie* v. *Higginbotham*, 4 Bell's Ap. 278.

mortgagor indicate the contrary by his will, the mortgaged estate is primarily liable to pay the debt as between the heir and executor.[a] [1]

119. So the equity of redemption might itself be the subject of a mortgage; and all mortgages after the first are truly mortgages of the equity of redemption.[2]

120. The equity of redemption is lost, after the lapse of twenty years without any intermediate acknowledgment of title.[b] [3]

121. If the mortgagor die without heirs and intestate, the equity of redemption belongs not to the crown, but to the mortgagee,[4] subject to the debt of the mortgagor.[c]

122. *Vote at elections.*—The mortgagor may vote for members of Parliament, unless the mortgagee is in actual possession, provided he show a qualification over and above the interest on the mortgage-debt; if the mortgagee is in possession, he is entitled to vote.[d] [5]

123. *Equitable mortgages.*—If the owner of land deposit the title-deeds as a security for money lent or to be advanced, or even without saying anything, this amounts to an equitable mortgage on all the property comprised therein, unless a contrary intention is shown.[e] [6] That is to say, a court of equity treats this as an agreement to exe-

[a] 17 & 18 Vic. c. 113.
[b] 3 & 4 W. IV. c. 27, § 28.
[c] *Beale* v. *Symonds*, 16 Beav. 406.
[d] 6 & 7 Vic. c. 18, § 74.
[e] *Ashton* v. *Dalton*, 2 Coll. 565; Exp. Wright, 19 Ves. 258; *Russell* v. *Russell*, 1 Bro. C. C. 269; Exp. Haigh, 11 Ves. 403.

IN SCOTLAND.

[1] So it has always been. Ersk. 3, 8, 52; M. 3574; *Ogilvie* v. *Dundas*, 2 W. S. 214.

[2] The principle of heritable securities is different, as the debtor, continuing to hold the radical feudal estate in the lands, may create successively any number of incumbrances or burdens on the fee.

[3] However long the heritable creditor may be in possession on his security, he cannot prescribe an absolute right to the lands, so as to preclude redemption. But he may adjudge and obtain a decree of expiry of the legal, after which his title is absolute, and the debtor's right to redeem is gone.

[4] *Contra;* the fee, being in the debtor, would go to the Crown as *ultimus hæres.*

[5] *Contra;* the debtor is entitled to vote, though the interest of the debt swallows up the rent. Cay's Ref. Act, § 53.

[6] *Contra;* it would merely give a lien upon the deeds as chattels, but would give no real right in the lands, nor warrant the Court to order implement. See *Menzies* v. *Murdoch*, 4 D. B. M. 257; *Renny* v. *Myles*, 9 D. B. M. 619. But see as to future advances, *ante*, § 97*n*.

cute a mortgage, and considers that as already done which ought to be done. And where a deposit of the title-deeds of an estate in Scotland was made in England, this was held to constitute an equity, which the English Court took hold of to enforce specific performance.[a] [1]

124. So any writing, signed by the owner, showing an intention to create a mortgage, will operate as an equitable mortgage.[b] [2]

125. So if a vendor by agreement keep the titles as a security for the whole or part of the unpaid purchase-money, he will have an equitable mortgage.[c] [3]

126. So a mere delivery of the title-deeds held by a depository as equitable mortgagee, will constitute a good transfer of the equitable mortgage to the second depository.[d]

127. An equitable mortgage, by deposit of title-deeds, has priority over subsequent purchasers or mortgagees of the legal estate with notice, but not where there is no notice.[e]

128. The remedies of an equitable mortgagee are in general the same as those of other mortgagees, except that the remedy is only in a court of equity.

STATUTORY MORTGAGES, ETC.

129. There are some other estates which resemble mortgages as having a similar effect.

130. Estates by statute staple and statute merchant were created by a bond entered into by the debtor; and if the money was not paid on the day fixed, the sheriff was authorised to deliver the lands and goods of the debtor to the creditor to hold till the debt was paid.[f]

There was also a security called a recognisance, which was a bond which might have a similar effect.[g] These forms are now obsolete,

[a] Ex p. *Pollard*, Mont. & Ch. 340; 3 Mont. & Ayr. 340.
[b] 2 Spence's Eq. Jur. § 777.
[c] *Mackreth* v. *Symmons*, 15 Ves. 328; Sugd. V. & P. 856.
[d] 5 Byth. Prec. 114; Coote, 173.
[e] Coote, 170; Story's Eq. Jur. § 1020.
[f] Burton's Comp. § 869; 2 Inst. 322; 2 Wms. Saund. 69c.
[g] Burton's Comp. 871.

IN SCOTLAND.

[1] *Quære*, whether this would be recognised in any question of ranking in the Courts in Scotland?

[2] *Contra*; nothing short of a deed or other security completed by sasine will so operate.

[3] *Contra*; but the vendor may make the price a real burden. See *post*, Chap. XI.

but a recognisance is still the form of a security taken by justices of the peace, etc., when a person is bound over to appear and prosecute felons, etc. This is also the form of the bonds relating to the revenue, whereby a debtor becomes bound to the crown; or, in order to secure costs, in appeals to the House of Lords. Between private debtors and creditors, the form of security now in use is a warrant of attorney,[1] which has a similar effect to that produced by the older forms.

131. *Estates by elegit.*—Another kind of mortgage is an elegit, which is the writ of execution at common law, by which a judgment creditor directly acquires his debtor's lands. Immediately after judgment is signed, a writ of elegit is issued to the sheriff, who enters upon possession of the debtor's lands, and delivers them to the creditor to hold till the debt is paid. The creditor, who thereupon becomes tenant by elegit, and has the same disposing power over the estate as the debtor,[a 2] becomes in effect a mortgagee, but he cannot take the steps competent to a mortgagee until one year has elapsed.[b]

132. The debtor may foreclose as in other cases within twenty years.[3]

133. An estate by elegit is a chattel interest, and goes to the executor.[c 4]

134. *Registered judgments.*—Another statutory mortgage or charge is created by registering any judgment, decree, rule, or order of a court of law or equity, by which a debt has been judicially established against the debtor. By registering the judgment, decree, etc., in the registry of the Common Pleas, and re-registering it every five years, the judgment-

[a] 1 & 2 Vic. c. 110, § 11. [b] *Ibid*, § 13. [c] Burton's Comp. § 808.

IN SCOTLAND.

[1] All bonds may operate in this way, and generally do so, by having at the end, a clause of registration inserted, upon which execution issues at once, without any action. Bell's Pr. § 68; Ersk. 2, 5, 54; 1 Ross's Lect. 192.

[2] By adjudication, which is partly an action, the creditor acquires possession of the lands. He must, however, register the abbreviate of adjudication, and, in some cases, must obtain further a charter of adjudication, and infeftment. Bell's Pr. § 2300.

[3] He can foreclose after ten years, by getting a decree in an action of declarator of expiry of the legal. Bell's Pr. § 2301.

[4] *Contra*, as to the security by adjudication. Bell's Pr. § 1485.

debt becomes a charge on the lands of the debtor, and is good against all subsequent purchasers and mortgagees.[a 1]

CHAPTER VII.

ESTATES IN POSSESSION, REVERSION, OR REMAINDER.

139. As regards the time of enjoyment of an estate, estates are said to be in possession or expectancy, *i. e.*, the owner is either entitled to immediate possession, or he is entitled only to possess *in futuro*. Expectancies are called either reversions or remainders.

140. *Reversion and remainder.*—Where the owner of the fee-simple grants an estate for years, or for life, either of which is a smaller estate, he either retains the rest of his estate to himself, or grants it to another. If he retains it, it is called a reversion; if he grants it to another, it is called a remainder. The smaller estate meanwhile is called the particular estate, being only a part of the entire estate or fee-simple.[2]

141. *Incidents of the reversion.*—The reversioner may or may not reserve a rent payable by the tenant for years or life. If he does, he has an implied right to distrain the goods found on the lands for payment of such rent, which right is further extended and regulated by statutes.[b 3] This rent is called rent-service.

[a] 1 & 2 Vic. c. 110; 2 & 3 Vic. c. 11; 3 & 4 Vic. c. 82; 18 & 19 Vic. c. 15.

[b] Litt. § 213, 214. See *post*, "Landlord and Tenant."

IN SCOTLAND.

[1] *Contra;* this effect can be obtained only by action of adjudication; but see *post*, "Action at Law."

[2] These terms are not used, but "the fee" is used in contrast to the "liferent," and the liferent is said to be either a liferent by reservation (*i. e.*, where a grant is made of the fee, reserving to the granter a right of liferent), or a liferent by constitution (*i. e.*, where a right for life is granted by a third party).

[3] It is very unusual for the fiar to reserve a rent from the liferenter. But (which is the same thing) he may reserve an annuity payable to himself, making the annuity a reserved burden, and, as an incident of the reserved burden, he can poind the ground (*i. e.*, distrain, E.) Stair, 4, 23, 5; Ersk. 4, 1, 11; M. 10,550; Bell's Com. by Shaw, 918, 923. It is a common practice in such cases to take a bond from the disponee, as well as to have the burden reserved. Bell's Com. by Shaw, 922.

Estates in Possession, Reversion, or Remainder.

142. A rent-service follows the reversion, that is, if the owner or reversioner sell his reversion, the alienee has the right to receive the rent.[1] Moreover, there is no limit to the right of tenants for years, unless restrained by the lease, to create sub-tenancies, provided always the sub-tenant take a less term of years than his over-tenant. Thus A, the owner of the fee, may grant a term of fifty years to B, B may then grant a term of fifty years, wanting one day, to C, and C may grant a term of fifty years, wanting two days, to D, and so on.[2] If B were to grant the term for the whole fifty years to C, then C would take the entire estate of B, and would be his assignee, and not his sub-tenant. This distinction between a sub-tenant and an assignee is often important as regards the mutual rights and liabilities of landlord and tenant.[a] It used to follow, from the doctrine of merger, that if B's term were by any means destroyed, as by B purchasing the fee-simple, the rent paid by C to B was destroyed also; but now, by statute, this consequence is averted, and C continues liable to B, as he was before.[b]

143. *Remainder.*—A remainder differs from a reversion chiefly in this, that no tenure exists between the tenant for years and the remainderman,[3] and hence the latter has no right to a rent service, as an incident of his estate, for both he and the particular tenant, taken together, hold their estates precisely as their grantor did before.[c]

144. *Vested remainders.*—A series of remainders[4] may be granted one after another to any number of persons. Thus, suppose A the owner in fee-simple gives the lands to B for life, and after his de-

[a] See *post*, "Landlord and Tenant."

[b] 8 & 9 Vic. c. 106, § 9, which repealed and amended prior Acts.

[c] Litt. § 215.

IN SCOTLAND.

[1] So as to lands subject to a real burden.

[2] Owing to a presumption in some cases against the right of creating sub-tenancies, this practice is little known, but as to the distinction between sub-tenant and assignee, see *post*, "Landlord and Tenant."

[3] *Contra*; a real burden may be reserved in favour of a third person, as well as of the disponer, there being no true distinction between them. Bell's Com. by Shaw, 922.

[4] There may be successive liferents. But there are no remainders, properly so called, of the fee or *corpus*, the entire fee being in the heir of entail in possession for the time being. But the subsequent destinations, where there is a series of substitutions, resemble in form the remainders.

cease to C for life, and after C's decease to D for life, and so on, ending with the fee-simple to Z and his heirs; in such a case, though B the first tenant might survive all the other tenants for life coming after him, in which case they would never get anything, yet, from the moment of the execution of the deed, each tenant after B has an estate for life in remainder, expectant on the determination of the prior life-estate, immediately vested in him. Whenever it happens that on the death of the tenant for life in possession, or the forfeiture of his estate, the next tenant for life is ready to take, the latter is said to have a vested remainder.[1] If an estate-tail is interposed in the series, the tenant in tail, as already mentioned, would be able to bar, not only his own issue, but all the remainders coming after them.

145. *The rule in Shelley's case.*—It sometimes happens that in a series of estates for life ending with estates of inheritance, the same person takes two estates, with or without other estates interposed. Thus, if by deed or will an estate is given to A for life, and after his decease to his heirs, or to the heirs of his body, A takes an estate in fee-simple or an estate-tail respectively.[2] In such a case the words "heirs" or "heirs of his body" are said to be words of limitation, and not of purchase; A can alienate the entire estate. This is known as the rule in Shelley's case.[a]

146. If again the estate is given to A for his life, and after his decease to B for his life, and after B's decease to the heirs of A or the heirs of the body of A, in this case A takes an estate in fee-simple, or an estate-tail respectively. That is to say, A can at once sell the estate out and out, so as thereby to defeat his heir, though he cannot defeat B's life-estate.[3] The same rule applies, however many persons, as C, D, and E, may have had life-estates interposed

[a] As to this rule and its origin, and the reasons, see *Shelley's* Case, 1 Rep. 104 *a*; Fearne's Cont. Rem. by Smith; Do. by Butler; *Perrin* v. *Blake*, in Hargrave's Law Tracts; 3 Reeves' Hist. Eng. Law, 8.

IN SCOTLAND.

[1] These phrases not used.

[2] The fee also is in A. And where the destination is to A in liferent and his children *nascituris* in fee, A takes a fee-simple, unless there be taxative words added, such as "to A in liferent allenarly," or unless a trust be interposed. Bell's Pr. § 1713; *Frog's Creditors*, 1 Ross, L. C. 602.

[3] *Contra;* this construction would not hold in a deed of entail with similar destinations, nor in a simple destination.

immediately after B's, or if B had an estate-tail instead of an estate for life only.

147. *Contingent remainders.*—A remainder may be contingent as well as vested. A contingent remainder is one that is not vested, and may never vest by reason of the uncertainty of the event, or of the person who is to take. Thus, suppose land to be given to A for life, remainder in fee to the right heirs of B. As B can have no heirs till his death, and as he may have none at all at that period, it is uncertain whether there will be any person to take. Here the kind of interest taken by some person unknown, is a contingent remainder.[1]

148. *As to the fee in contingent remainders.*—It used to be a subject of perplexity to lawyers what became of the fee until the contingency happened, *i.e.*, between the death of A and the death of B. The ancients seemed to incline to the doctrine that it was in abeyance, or *in gremio legis*, or *in nubibus;* but the moderns hold that it must remain in the grantor and his heirs till the contingency occurs, and till there is a person ascertained who can take it.[a 2]

149. *Test of a contingent remainder.*—The test by which a contingent remainder is known, is generally considered to be these. It is a future estate, which is not ready, from its commencement to its end, to come into possession at any moment when the prior estate determines.[b]

150. *Rules as to contingent remainders.*—A contingent remainder is also subject to certain well-defined rules. 1. There must always be a particular estate to support it; for the seisin or feudal possession must always be in some one. 2. Every contingent remainder must vest or become an actual estate during the continuance of the particular estate which supports it, or at the moment of its determination. Hence, if land be granted to A for ten years, with remainder in fee to the right heirs of B, this remainder is void, for the freehold would not go out of the grantor during the ten years, and vest in A, and yet it was

[a] Fearne's Cont. Rem.; 2 Prest. Abst. 100; Co. Litt. 342 *a*; 1 P. Wms. 515.

[b] Fearne's Cont. Rem. by Smith.

IN SCOTLAND.

[1] This phrase not used.

[2] The difficulties as to a pendent fee were got over by a fiction of a fiduciary fee, as between parent and children. See *post*, "Marriage."

not in B, hence the grant was void altogether.[a] 3. An estate cannot be given to an unborn person for life, followed by any estate to a child of such unborn person; the latter gift will be void.[b] But in some cases the Courts endeavour to carry out the testator's intention as nearly as possible by the doctrine of *cy près*, and instead of giving an estate for life to the unborn issue of a living person, give him an estate-tail, so as to give his issue a chance of inheriting, provided the estate is not barred.[c]

151. A strict settlement[1] is where the husband takes an estate for life, remainder in fee to his first, and other sons in tail.

152. *Alienation of contingent remainders.*—A contingent remainder could not at one time be conveyed or assigned, being considered a mere possibility; but now it may be disposed of by deed,[d] and also by will.[e]

153. *Trustees to preserve contingent remainders.*—Contingent remainders were liable to be destroyed by the sudden determination of the particular estate, or by merger, or by forfeiture. Thus, suppose an estate to A (a bachelor) for life, and after his decease to his eldest son O, and the heirs of the body of O, and in default of such issue, to B and his heirs. If A died without any son, then the contingent remainder of O was destroyed; so if A had purchased B's remainder in fee; and so if A had forfeited the particular estate. Hence it was common to give the intermediate estate between A and B to trustees to preserve contingent remainders;[2] but now by statute the contingent remainder is preserved intact without the need of such trustees.[f]

[a] *Chudleigh's* case, 1 Rep. 130 *a*.
[b] Fearne's Cont. Rem.; 2 Preston Abst. 114; 1 Jarman on Wills, 221; 1 Sugd. Powers, 470; Lewis on Perpetuities.
[c] See 1 Jarman on Wills; Williams on Real Property.
[d] 8 & 9 Vic. c. 106, § 6.
[e] 1 Vic. c. 26, § 3.
[f] 8 & 9 Vic. c. 106, § 8.

IN SCOTLAND.

[1] A settlement means generally a disposition of a person's heritable, or heritable and moveable, estate *mortis causa*, in other words, a will; which must, as to real estate, be by deed.

[2] This operation of conveyancing not known.

CHAPTER VIII.

JOINT ESTATES.

154. *Estates in severalty.*—Where an estate in fee-simple is held by one individual and his heirs, he is said to have an estate in severalty. But it frequently happens, that two or more individuals have a joint estate in the lands.

155. *Estates in community.*—The estates held in community are either joint estates or joint tenancy; estates in common or tenancy in common; or estates in coparcenery; to which may be added a tenancy by entireties, which is a species of joint tenancy.[1]

156. *Joint Tenancy generally.*—An estate or interest in joint tenancy is a joint interest in a plurality of persons during their joint lives acquired in the same land by the same title, not being a title by descent, and at the same time. There is the benefit of survivorship[2] between such persons, and the estate is created by the absence of words which imply, that they are to take distinct shares. Thus, if the fee is given by deed to "A and B" without other words, A and B are joint tenants for life, the whole going to the survivor.

157. *Joint tenancy, what?*—A joint tenancy,[3] shortly stated, is thus, a joint, equal, undivided interest, held by several persons in one thing, with a benefit of survivorship, *i.e.*, if A, B, and C are joint tenants, and A dies, B and C have the whole; and if B dies next, C has the whole.

158. A joint tenancy is presumed at common law, but not in a court of equity, where a tenancy in common is preferred, if there

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IN SCOTLAND.

[1] The division is into common property (tenancy in common, E.) and common interest. Thus, where the different floors of a house, having a common roof and staircase, belong to several owners, these owners are said to have a common interest in such roof and staircase.

[2] *Contra;* there is no survivorship without express words. See *post* as to "Destinations," § 172.

[3] *Contra;* There is no short phrase having this exact meaning, the only phrase being common property, or joint-ownership. Only one kind of common property is recognised.

are any circumstances to lay hold of which which will support that construction.[a]

159. *Alienation by joint tenant.*—A joint tenant can at any time, during his life, change his joint tenancy into a tenancy in common.[b] But he cannot do so by will.[c] If he alienate his entire interest to a companion or to a stranger, this makes the alienee a tenant in common of the share originally belonging to the alienor. When a joint tenant alienates his interest to his companion, the proper deed by which he does this is called a release.[d]

160. *Joint tenants severing.*—The joint tenants may also sever the joint tenancy by a voluntary partition among themselves, *i.e.*, by deed of partition; or one of them may apply to the Court of Chancery for a compulsory partition.[e] [1]

161. *Survivorship.*—Where one joint tenant dies without having alienated his interest, or severed the joint tenancy, his interest will not descend to his heirs or representatives, or pass by his will, but will accrue to the survivors.[2] This survivorship is the peculiar characteristic of a joint tenancy. Hence trustees are always made joint tenants, for the convenience of the estate thereby immediately vesting in the survivors on the death of any one of them.[3]

162. *Tenancy in common.*—A tenancy in common differs from a joint tenancy in this, that in the former there is no survivorship.[4] The undivided share of any one dying descends to his heirs or representatives, or may be bequeathed or devised by his will. It is often difficult to determine, in the construction of wills, whether the

[a] Story's Eq. Jur. 206; 2 Spence's Eq. Jur. 206.
[b] Co. Litt. 186 *a*;
[c] *Litt.* § 287; Perk. § 500.
[d] Co. Litt. 169 *a*; but a grant would operate as a release, *Chester* v. *Willan*, 2 W. Saund. 96 *a*.
[e] *Manners* v. *Charlesworth*, 1 Myl. & K. 330; the old writ of partition at common law being abolished by Stat. 3 & 4 W. IV. c. 27, § 36.

IN SCOTLAND.

[1] A brieve of division directed from Chancery to the Sheriff may be obtained, or an action of declarator and division. *Bryden* v. *Craig*, 15 S. D. 486.

[2] *Contra* as to joint ownership. Thus where the property is given to A and B, "in conjunct fee," the heir of the first who dies takes his share. Ersk. 3, 8, 35; Stair, 2, 3, 42.

[3] This is done by making an express destination of the estate to the survivors or survivor.

[4] The same as to joint ownership.

Joint Estates.

devisees or legatees are intended to be made joint tenants or tenants in common.

163. Any tenant in common can compel partition by applying to a court of equity.[a] [1] So a tenant in common can at any time alienate his share; or all the tenants may agree to a partition,[b] which must be done by deed.[c]

164. *Coparceners.*—Where females or their representatives take land by descent as next heirs, they take as coparceners.[2] There is no survivorship.

165. Any coparcener, by alienating, may change her interest into a tenancy in common, or compel a partition by applying to the Court of Chancery for a commission; or the coparceners may voluntarily agree to a partition either by lots or otherwise.[d]

166. The eldest coparcener is not entitled to one part of the lands more than to another, nor to the first choice in a partition,[3] unless such be the agreement between them; [e] and if the estate cannot be equally divided, the one obtaining the largest part must make compensation to the other. The eldest coparcener is no more entitled, than any of the others, to the custody of the title-deeds.[4]

167. *Tenancy by entireties.*—A tenant by entireties is where a conveyance of lands is made to "A, and W his wife." In such a case each has an entirety.[f] [5]

[a] Story's Eq. Jur. § 650-7.
[b] 2 Bl. Com. 194.
[c] 8 & 9 Vic. c. 106, § 3.
[d] 2 Cruise, T. 19, § 12 *et seq.*
[e] 2 Cruise, T. 19, § 31.
[f] Litt. § 291; Burt. Comp. § 757.

IN SCOTLAND.

[1] The same. Bell's Pr. § 1081. [2] The same as to heirs-portioners.

[3] *Contra;* she is entitled to a preferable right or *præcipuum*, without compensation to the other heirs-portioners, *e. g.*, to the mansion-house on a country estate, but not to a town-house; also to the first choice in a division of the property. Bell's Pr. § 1695. See *Inglis* v. *Inglis*, Hume, 762; *Halbert* v. *Bogie*, 28 May 1857.

[4] *Contra.* M. 2447.

[5] *Contra;* the fee would be solely in the husband or the wife, according to circumstances. Where property is given to A and W, his wife, in conjunct fee and liferent, this gives the fee to the husband as the *dignior persona*, subject to the liferent of the wife, in case she survives. So if the destination is to "A and W, in conjunct fee and liferent, and the heirs of the marriage in fee," the fee is in A (M. 4238), unless the property came from W, or her interests were otherwise preferred in the deed, as where the ultimate destination is to her heirs. See *post* as to these destinations, Part IV. "Marriage."

168. Where the conveyance is to A, and W his wife, and B, one moiety goes to A and W together, and the other moiety to B alone. But when the husband and wife are both of kin to a testator, the construction might be different.[a] A, the husband, cannot alienate without the consent of his wife.[b]

169. *Alternate ridges of land.*—There is no kind of joint property in land such, that of two parties each is entitled to an alternate [1] ridge of the soil.

170. *Limitation of joint-estate for life.*—If lands be given by deed simply to "A and B" without further words, they will become at once joint tenants for life.[c] [2] If, however, the same gift is by will, they will, in the absence of any expression denoting a contrary intention, be joint tenants in fee.

171. *Limitation of joint estate tail.*—If lands be given "to A and B, and the heirs of their two bodies," [3] two constructions result. Thus, if A and B are persons who may possibly intermarry so as to have one heir of their body, they will have an estate in special tail; during their joint lives they will be entitled to equal moieties of the rents and profits; after the death of either, the survivor will take the whole for life; and their common heir, if any, will take the whole in fee. If, on the other hand, A and B cannot intermarry, as where they are both males or females, they will have equal shares for their joint lives, the survivor will have the whole for his or her life, and the heir of each will be entitled, as tenant in tail, of one moiety of the fee, *i.e.*, they will be tenants in common of the fee.[d]

172. *Limitation of joint tenancy in fee.*—A limitation of lands to "A and B and their heirs," or to "A and B, their heirs and assigns,"

[a] *Warrington* v. *Warrington*, 2 Hare, 54.

[b] 1 Prest. Shep. T. 131. See further as to limitations in case of husband and wife, *post*, Part IV. "Marriage."

[c] Litt. § 283.

[d] Litt. § 16, § 283. *Re* Tiverton Market Act, 20 Beav. 374.

IN SCOTLAND.

[1] *Contra*; called *runrig lands*; Ersk. 3, 3, 59. But a statute, 1695, c. 23, enabled the parties to compel a division of the lands held on such a tenure. See a difficulty as to the ownership of mines under the surface, *Forbes* v. *Livingstone*, 7 W. S. 375.

[2] In the case put, A and B will be co-owners in fee-simple.

[3] *Contra*; in neither case would the survivor have the whole for life, unless the words "and to the survivor" were expressed in the destination.

makes A and B joint tenants in fee.[1] Hence, if the joint tenancy continue, and B die first, the whole will go to A, and his heirs will succeed to the whole fee.[a] This kind of limitation is that used when real estate is conveyed to trustees, in order that, on the death of any one, the whole estate may vest in the survivors or survivor and heirs of the survivor, without the necessity of any fresh conveyance.

CHAPTER IX.

COPYHOLDS.

173. *Origin of Copyholds.*—Copyholds are a relic of the feudal system. The lands are held by copy of the court-roll, that is to say, the title consists of a copy of the roll or book in which an account is kept of the proceedings in the court of the manor to which the lands belong. All copyhold lands are parcel of some manor,[2] and every

[a] Co. Litt. 184 *a*, 280; Bac. Abr. Joint Tenants (A).

IN SCOTLAND.

[1] *Contra;* unless A and B were husband and wife, the heirs of each would severally succeed to his share on death respectively. Thus the words "and the survivor" must be specially introduced.

It follows that the common destinations in Scotland of conjunct rights would be expressed in England as follows. Thus, a disposition to "A and B in conjunct fee" (Stair, 2, 3, 42; Ersk. 3, 8, 35) would be thus expressed, viz, "to A and B, and their heirs, as tenants in common," if by deed; to "A and B, as tenants in common," if by will. A disposition to "A and B in conjunct fee and liferent" (Bell's Pr. § 1709) would be thus expressed, viz., to "A and B as joint tenants for life, remainder to A and B, as tenants in common in fee." A disposition to "A and B jointly, and the survivor and their heirs," would be thus expressed, viz., to "A and B as joint tenants in fee." *Bisset* v. *Walker*, M. Ap. Deathbed, No. 2; *Scott* v. *Maxwell*, 26 Sc. Jur. 535. Where A and B are husband and wife, see *post*, "Marriage."

[2] There are no manors properly so called; but each superiority and the *dominium eminens*, or estate of the Crown in the lands, resemble manors. There is a species of royal grant called a barony, which, however, is chiefly remarkable for its having certain pertinents impliedly carried with it. It is practically a mere erection by the Crown of separate lands into one feudal tenement. Bell's Pr. § 749.

manor, with trifling exceptions, is of an origin prior to the statute *Quia Emptores*, 18 Ed. I. c. 1.[a]

174. When a baron or lord granted a portion of his lands, the parts he reserved were called the demesnes of the manor, the other parts were granted to his villeins. The more favoured of the villeins were called freeholders, and the two sets of tenants were admitted at different courts. The freeholders were admitted to a court baron; the villeins to a customary court. At first the estate of the tenant was one held at will, but gradually grew into one of inheritance.[1] On alienation, the villein, before parting with his land, was obliged to surrender it to the lord, who thereupon admitted the purchaser as tenant in his room; and this is still the case.[b]

175. *Nature of copyhold estate.*—Copyhold is in strictness an estate at will, and has many of the incidents of such an estate, but it is practically as secure as a freehold. It is preferable to a freehold in this respect, that all the transactions concerning it are entered in the court-rolls of the manor, a circumstance which gives the advantage of a local register.[c] [2]

176. *Powers of copyholder.*—The estate of a copyholder being, as already stated, an estate at will, which is the smallest estate known

[a] 1 Watk. Cop. 15. See *ante*, § 18.
[b] 2 Bl. Com. 90; Watkins on Copyholds; Scriven on Copyholds.
[c] Co. Cop. § 9.

IN SCOTLAND.

[1] The feudal, or universal tenure, in its forms closely resembles that of copyhold, but its conveyancing is more elaborate and solemn. The vassal also acquired by slow degrees the absolute right of alienation, and he must still resign his lands into the hands of the superior, who thereupon regrants them by charter of resignation to the purchaser, or the vendor grants merely a disposition, with a base holding, leaving the purchaser to go to the superior and demand a charter of confirmation. In general, the disponee may hold either *a me vel de me*, *i.e.*, may hold either of the disponer as a superior, or hold of the disponer's superior direct. As to the mode of completing the titles, see 1 Jurid. Styles, 72 *et seq.*; Menzies' Lectures on Convey.; 21 & 22 Vic. c. 76, and see *post*, § 364.

[2] The title is not of so simple and rudimentary a kind. But there are local and general registers for all kinds of deeds affecting lands.

to the law, the lord is the only person feudally invested [1] and actually seised in the lands,[a] and who can exercise the powers of a freeholder. The copyholder has a possessory interest, and he may have a right of property by the custom; but without such custom the mines belong to the lord, and even the timber,[2] though the lord cannot go upon the land to open mines or cut the timber without the consent of the copyholder.[b] So the copyholder cannot even grant a lease [3] of his land for more than one year, without a license from the lord.[c] And if the copyholder commits waste, either voluntary or permissive, this is a cause of forfeiture to the lord.[d] [4]

177. *Customary freeholds.*—There is a modification of copyhold estate, called customary freehold, or customary tenements, prevalent chiefly in the north of England, which, however, is substantially the same thing, the chief difference being that it is not expressed in the copy of a customary freehold to be held at the will of the lord. But the incidents are the same. The freehold is in the lord, and the tenant cannot open mines, cut timber, or let his land,[e] unless the custom warrants it.

178. *Variety of local customs.*—The soul of copyhold estate is custom, and each manor has its own peculiar customs.[5] Thus, some manors allow of no larger estate in copyholds than an estate

[a] 1 Watk. Cop. 44; 1 Scriven Cop. 605.
[b] 1 Watk. Cop. 332; 1 Scriv. Cop. 499.
[c] 1 Watk. Cop. 327; *Doe d. Robinson* v. *Bousefield*, 6 Q. B. 492.
[d] 1 Watk. Cop. 331; 1 Scriv. Cop. 526; *Doe d. Grubb* v. *E. Burlington*, 5 B & Ad. 507; 2 Bl. Com. 284.
[e] *Doe d. Reay* v. *Huntington*, 4 East, 271; *Burrell* v. *Dodd*, 3 B. & P. 378; *Stephenson* v. *Hill*, 3 Burr. 1277; *Doe* v. *Danvers*, 7 East, 320; 2 Scriv. Cop. 665.

IN SCOTLAND.

[1] *Contra;* the superiority and the vassal's estate are two separate estates, both owners being seised, but the vassal's is the substantial estate. It is held for ever, subject to the feu-duties, etc., and, with that restriction, the vassal has, unless it is expressed to the contrary, the absolute use of the land, *i. e.*, he has the freehold—*a coelo usque ad centrum.* The superior has merely a perpetual rent or feu-duty, issuing out of the lands, and certain casualties.

[2] *Contra.* See last note.

[3] *Contra;* there is no such restriction on the vassal.

[4] *Contra;* there is no forfeiture on that ground to the superior.

[5] *Contra;* there are no peculiar customs, all vassals being on the same footing in all parts of the country.

for life; others admit of freeholds of inheritance. So certain phrases in the copy have peculiar meanings.[a]

Though each manor has its own peculiar customs which constitute the law of that manor, yet in general these are chiefly as follows:—

179. *Rents.*—Rents are sometimes, though not frequently,[1] paid by the copyholder to the lord of the manor. The lord may either distrain for the rent;[b] or he may bring an action of debt within six years. The rent is no charge on the land.

180. *Reliefs and heriots on death of copyholder.*—On the death of the copyholder intestate, if the copyhold is one of inheritance, his heir must generally pay a relief or fine[2] on or before admittance. The amount is regulated by the custom, provided it be reasonable; and no such fine is allowed which exceeds more than two years' improved value of the estate.[c] The lord may distrain, and, it seems, may also bring an action for the relief;[d] but it is no charge on the land.

181. The lord can sometimes also claim a *heriot*[3] on the death of the copyholder, *i.e.*, the best beast, or best jewel, or chattel that belonged to the deceased.[e] The lord can seize the beast or chattel, or bring an action of trover or detinue; and his right cannot be defeated by will or gift in fraud of such right. The right is, however, no charge on the land.[f] Sometimes a heriot is due even on

[a] 2 Watk Cop. 46.
[b] 4 Geo. II. c. 28, § 5; 1 Scriv. Cop. 366.
[c] 2 Bl. Com. 98, Doug. 697.
[d] 2 Scriv. Cop. 368.
[e] 1 Scriv. Cop. 437; 2 Watk. Cop. 129.
[f] 1 Scriv. Cop. 387, 8.

IN SCOTLAND.

[1] The payment of a feu-duty is general, though it varies in amount, the superior fixing it by arrangement in the first charter or contract. The superior has a real security for his feu-duty (*i.e.*, it is a charge on the land). He has a hypothec; he can poind the ground (*i.e.*, distrain); he can sue the vassal within forty years, and he can raise an action of declarator of irritancy or tinsel of the feu *ob non solutum canonem* (*i.e.*, the estate will be forfeited).

[2] The vassal's heir pays a relief of one year's feu-duty as incidental to his holding. Ersk. 2, 5, 48; *Stirling* v. *Ewart*, 3 Bell's Ap. 128. The superior refuses to enter the heir until the relief is paid; and if the heir refuses to enter, the superior can enter into possession under a decree in an action of declarator of non-entry, Bell's Pr. § 705. On the other hand, the heir can compel the superior to enter him. 20 Geo. II. c. 50; 10 & 11 Vic. c. 48. The relief is a *debitum fundi* (a charge on the land).

[3] *Contra;* this custom is not known as an incident of tenure; but as between the heir and executor of a person who dies seised in lands, the heir has a right to the best of certain moveables, called heirship moveables. Bell's Pr. § 1903. See *post*, "Succession."

the death of a freeholder, where a lord of the freehold exists ;[a] but now any freeholder, liable to this incident, may, upon certain terms, compel its extinguishment.[b]

182. *Escheat.*—On the failure of heirs of the copyholder, or the corruption of his blood by attainder, the estate escheats not to the crown, but to the lord.[c] [1]

183. *Fine on alienation.*—In general there is, by the customs of manors, a fine due on every change of tenancy by alienation, as well as death. The fine or sum of money due to the lord, on an admittance of the alienee, varies according to custom; but in general cannot exceed two years' improved annual value, after deducting quit-rents.[d] [2] The lord cannot distrain for the fine, but he can sue for it within six years.[e] The fine is not a charge on the land.[f] If the fine is certain in amount, the non-payment at the time it is due is a cause of forfeiture.[g]

184. *Alienation of copyholds.*—Alienation of copyholds, *inter vivos*, takes place by way of surrender and admittance. Formerly the copyholder, wishing to alienate, used to attend at a customary court, consisting of the other copyholders, called the homage, and there surrender; but now the presence of any copyholder is not necessary to make a court,[h] though for some purposes the old ceremony is kept

[a] *Damerell* v. *Protheroe*, 10 Q. B. 20.
[b] 21 & 22 Vic. c. 94, § 6.
[c] 1 Scriv. 522; 1 Watk. 340; *R.* v. *Wilkes*, 3 B. & Ald. 511; *Lord Cornwallis'* case, 2 Ventr. 38.
[d] 1 Cruise T. 10, c. 4; 1 Scriv. Cop. 384. As to fine on compulsory alienation, see *Cooper* v. *Norfolk*, R. Co. 3 Exch. 546; on Joint-Tenants and tenants in Common, see *R.* v. *Eton College*, 8 Q. B. 526; *Wilson* v. *Hoare*, 2 B. & Ad. 350; 10 A. & E. 236; *Sheppard* v. *Woodford*, 5 M. & W. 608; Burt. Comp. 433.
[e] 3 & 4 W. IV. c. 42, § 3.
[f] 1 Scriv. Cop. 356.
[g] *Ibid*, 357.
[h] 4 & 5 Vic. c. 35, § 86.

IN SCOTLAND.

[1] *Contra;* the feu goes not to the superior, but to the Crown, in these circumstances. Stair, 3, 3, 47; Ersk. 3, 10, 2. See *ante*, § 3.

[2] The composition on entry of a singular successor, where it is not taxed (*i. e.*, specified) in the original or earlier grant, is one year's rent at the time when the new charter is to be granted. Bell's Pr. § 720. The superior cannot poind the ground for the composition, but he can withhold the charter until it is paid, Bell's Pr. § 726; and he may proceed against the vassal as in the case of non-entry. The composition is a *debitum fundi*. As to how far trust disponees of the vassal, and heirs of entail are singular successors, see Bell's Com. by Shaw, 742. *M'Lachlan* v. *Tait*, 2 S. D. 267; *Ross* v. *Heriot's Hospital*, 6 June 1815, F. C.

up. The transactions of the customary court are entered in a book called the court-rolls, kept by a special officer called the steward of the manor, and the tenants have a right to inspect these court-rolls.[a] The steward of the manor[1] has defined duties, and has a right to certain fees according to the custom.

185. *Ceremony of surrender.*—The surrender takes place before the lord or his steward, the ceremony consisting in the symbolical delivery of a rod or glove by the surrenderor. On such delivery, the lord or steward re-grants the same land to the surrenderor's nominee or the surrenderee, to hold on the same rents and services, and as a symbol of corporeal seisin, delivers the rod or glove to the surrenderee. A memorandum of the surrender is entered on the court-rolls; and formerly, if the surrender took place out of court, a presentment of the fact was made by the homage[2] at the next court. On the admittance, a further memorandum of that fact is made by the steward, and a copy of the court rolls is given to the surrenderee as a muniment of his title. The stamp-duty on this copy is the same as that on the sale of a freehold estate of equal value.

186. *After surrender, but before admittance.*—Until admittance of the surrenderee, the lord looks only to the surrenderor as his tenant, who, however, is said to hold only *sub modo*, and is in fact a trustee for the surrenderee.[b] The surrenderee at that stage cannot surrender to a third party, for no estate is yet vested in him, and he is treated

[a] 1 Scriv. Cop. 587. [b] 1 Watk. Cop. 102.

IN SCOTLAND.

[1] There is no officer of this kind.

[2] The *pares curiae* in ancient times performed similar functions on the occasion of the superior giving possession to his vassal. A *breve testatum* was at first a brief memorandum, certifying that the vassal had been invested; afterwards it preceded the act of giving sasine, and became an authority to the superior's commissioner or bailie to give sasine; of late, sasine has been effectually given by the disponee producing the warrant to a notary-public, who prepared an instrument attested by witnesses, and setting forth that sasine had been given. 8 & 9 Vic. c. 35. But now no separate instrument of sasine is necessary; it is enough to register the disposition in the Register of Sasines. 21 & 22 Vic. c. 76, § 1.

as a trespasser *ab initio*.[1] The surrenderee accordingly acquires by the surrender merely an inchoate right to be perfected by admittance.[a] This right is inalienable, except by will,[b] though it may be released by deed to the tenant of the lands.[c] The surrenderee can, however, compel the lord by a *mandamus* or a bill in Chancery to admit him.[d][2] The lord is merely a ministerial officer for the purpose of admittance.[e]

187. *Admittance, when, and its effects.*—After the surrender is made, the surrenderee can at any time[3] procure admittance to the lands surrendered to his use, and on admittance he becomes tenant to the lord, and pays the customary fine. If the admittance is not taken immediately, contrary to the usual practice, the admittance nevertheless relates back to the date of the surrender. Hence, if the surrenderor should, subsequently to the surrender to A, surrender to a second surrenderee B, who has been first admitted, yet, on A's subsequent admittance, A will displace B.[f][4]

[a] *Doe d. Tofield* v. *Tofield*, 11 East. 246; *R.* v. *Mildmay*, 5 B. & Ad. 254; *Doe d. Winder* v. *Laws*, 7 A. & E. 195.

[b] 1 Vic. c. 26, § 3; 4 & 5 Vic. c. 35, § 88.

[c] Co. Litt. 60 *a*.; *Kite & Queinton's* case, 4 Rep. 25 *a*.

[d] 2 Bl. Com. 369; *R.* v. *Manor of Bonsall*, 3 B. & C. 175; *Doe* v. *Harrison*, 6 Q. B. 631.

[e] 4 Rep. 27; 1 Rep. 140.

[f] 1 Watk. Cop. 103.

IN SCOTLAND.

[1] *Contra*; the vassal, before he is infeft, may, in general, transfer his right, which is called a personal right to the lands, by a deed called a disposition and assignation, and the disponee can afterwards make his right real. He may do so, according to circumstances, either by infeftment only, or by charter of resignation and infeftment, or writ of resignation recorded, or by infeftment and charter or writ of confirmation, or by charter of resignation and confirmation, etc. See Menzies' Conv. 623. 21 & 22 Vic. c. 76, § 4-8.

[2] The same. 20 Geo. II. c. 50; 10 & 11 Vic. c. 48.

[3] The disponee of the vassal is not bound to be infeft, if the disponer is alive and was infeft, because the fee is full and the superior has a vassal. M. 15,027; 2 Ross L. C. 161.

[4] *Contrà*; the test of priority is the date of the registration of the sasine or infeftment. Hence if B, in the circumstances stated, were first infeft, he would defeat A's title entirely, and A would only have an action of damages against the granter. Thus it is of vital importance to complete the disponee's title, by promptly taking infeftment, which can now be done by simply recording the conveyance in the Register of Sasines. 21 & 22 Vic. c. 76, § 1.

188. *Heir of copyholder before admittance.*—The heir of a deceased copyholder, before admittance, has a complete title as against third parties, for his ancestor's right vests in him immediately upon the death; but as against the lord, he cannot in general surrender until admitted,[1] or at least until he satisfies the lord for his fine or relief.[a]

189. *If no heir or devisee appears.*—On the copyholder's death, if no heir or devisee claim, the lord, after proclamation at three successive customary courts, can seize the lands into his own hands *quousque*,[2] *i. e.*, until some person claim.[b] And by the custom of some manors, he is entitled to seize the lands absolutely. The rights of infants, married women, and lunatics, are, however, expressly saved by statute, and these may appear by their guardian, attorney, or committee respectively, or in default, the lord or his steward may appoint a fit person to act as attorney for that purpose only.[c] If the fine be not paid, the lord can enter and receive the rents till it be satisfied; but no absolute forfeiture of the lands is to be incurred by the neglect or refusal of infants, married women, or lunatics.[d]

190. *Alienation by will.*—Formerly the course on alienation by will resembled alienation *inter vivos*. The testator by will required to surrender to the use of his will; but by statute [e] the will was de-

[a] 1 Scriv. Cop. 295.
[b] 1 Watk. Cop. 234; 1 Scriven, 355.
[c] 1 W. IV. c. 65; 16 & 17 Vic. c. 70, § 108.
[d] *Ibid.* See also *ante*, § 180.
[e] 55 Geo. III. c. 192.

IN SCOTLAND.

[1] The title of the heir is renewed and completed by grant from the superior with sasine, or by recording a writ of *clare constat*. 21 & 22 Vic. c. 76, § 11. The superior either grants on his own knowledge of the heir by giving him a precept of *clare constat*, or he grants on a retour, *i. e.*, the return on a verdict of an inquest finding that the claimant is the right heir. See also *ante*, § 180.

[2] The superior is entitled to have a vassal feudally invested, or, if there is no vassal, to take possession of the lands, and draw the rents. Ersk. 2, 5, 29; Stair, 2, 4, 16. Hence, if the heir neglect to renew the investiture, the lands are in non-entry, and the superior can, after an action and decree of declarator of non-entry, get possession, and draw the rents and poind the ground. If, however, there is no heir at all, the Crown, and not the superior, succeeds as *ultimus hæres*.

clared good, though no such surrender had been made.[1] A devisee, though himself unadmitted, can devise his interest also by will.[a] Formerly it was necessary that the homage should, at the next court, make a presentment of the will, whereupon the devisee was admitted. But now the mere delivery to the lord or his steward of a copy of the will, is sufficient to authorise its entry on the court-rolls, and the devisee can be admitted at once, without any court being held for the purpose.[b]

191. Where the copyhold estate is subject to an executory devise, as where executors have merely a power and no estate given to them, they do not require to be admitted; and if they can sell before the lord has time to hold three customary courts, and to seize the land *quousque*, the purchaser may obtain admittance, and thus save the expense of the executors being also admitted. If, however, the lands have been devised to the executors in trust to sell, this devise giving them the estate, they must be admitted before selling, and must then surrender to the use of the purchaser.[c]

192. *Peculiarity of conveyancing.* Copyholds do not pass by the same conveyances as freehold estate.[2] Thus, the copyholder's estate being a mere estate at will, any attempt to convey it by the same deed as a freehold estate only occasioned a forfeiture to the lord, and still is simply null.[d]

193. *Dower and curtesy.*—Another peculiarity of copyholds is, that the husband has no *curtesy*[3] in his wife's copyhold lands, except by special custom.[e] So a wife has no *dower*[3] in her husband's

[a] 1 Vic. c. 26, § 3.
[b] 4 & 5 Vic. c. 35, § 88, 89, 90.
[c] See *Glass* v. *Richardson*, 9 Hare, 698; 2 De G. M. & G. 658; *Flack* v. *Downing College*, 13 C. B. 945.
[d] 1 Watk. Cop. 326; *Dimes* v. *Grand Junction Co.* 9 Q. B. 469.
[e] 2 Watk. Cop. 71.

IN SCOTLAND.

[1] *Contra;* the vassal cannot alienate by will, but he may, by a *mortis causa* disposition, convey the subject to any person he wishes to take after him, reserving his own liferent. Bell's Pr. § 1692; Ersk. 2, 8, 20. See *post*, "Succession."

[2] There is no substantial peculiarity as to conveyancing caused by difference in tenure, for nearly all property is held on the feudal tenure, burgage tenure being only a slight modification.

[3] *Contra*, the widow has terce as to the vassal's, and he has courtesy as to his wife's heritable property. See *post*, "Marriage."

copyhold lands, except by special custom, in which case her right is called free-bench.[a]

194. *Mortgage of copyholds.*—When the copyholder mortgages his estate, he makes a surrender upon condition that the money remains unpaid at the time appointed. No admittance accordingly takes place until that time, and if the money is then paid, the surrender is void without further ceremony. And even where the money is not paid at the time appointed, no admittance of the mortgagee usually takes place, unless he wishes to enter into possession. When satisfaction or payment takes place, an entry of satisfaction is made on the court-roll, and the original title of the mortgagor remains in full force.[b] [1]

195. *Estate-tail in copyholds, etc.*—The copyhold estate may be the subject of an estate-tail,[2] or an estate in fee-simple; it may be devised by will; is subject to the copyholder's debts; passes to his assignees, when he is a bankrupt or insolvent;[c] descends, subject to any peculiar custom of the manor to the same heirs, and generally is dealt with as freehold estate.[d] An estate tail in copyholds is barred by a simple conveyance by surrender.[e]

196. *Trusts of copyholds.*—Where a copyhold estate is the subject of a trust, the trustees are admitted as the legal copyhold tenants,[3] and account for the rents and profits to the *cestui que trust.* The *cestui que trust* cannot, however, dispose of his equitable estate because he cannot surrender.[f] But there are exceptions to this extent, that

[a] 1 Scriv. Cop. 89; 2 Watk. Cop. 73; *Doe d. Riddell* v. *Guinnell*, 1 Q. B. 682.
[b] 1 Watk. Cop. 116, 117; Burt. Comp. 420.
[c] 12 & 13 Vic. c. 106, § 209; 1 & 2 Vic. c. 110, § 47; 7 & 8 Vic. c. 96.
[d] 3 & 4 W. IV. c. 104; c. 106; 1 & 2 Vic. c. 110, § 11.
[e] 3 & 4 W. IV. c. 74, § 50.
[f] 1 Scriv. Cop. 262.

IN SCOTLAND.

[1] When a vassal gives a bond and disposition in security, the bondholder or creditor completes his security by taking infeftment, but the vassal or debtor still continues feudally invested and retains the fee, and is liable to all the burdens affecting the feu. See *ante*, § 92*n*, 106*n*.

[2] Where lands are entailed, the superior of the lands is not bound to give entry so as to exclude all chance of compositions for singular successors, but is entitled to reserve in his charter all rights and casualties. Bell's Pr. § 718; Wallace, 14 S. D. 599.

[3] The trustees of a vassal's estate are seldom feudally invested.

a tenant in tail of a merely equitable estate in copyholds may bar his estate-tail ;[a] and a married woman having an equitable estate may, with her husband's concurrence, by deed duly acknowledged by her, separately convey her equitable interest.[b]

197. *Power of lord to alter tenure or customs.*—The lord of the manor having in him the freehold estate, may, in the first instance, at his option, grant either the freehold estate in the lands, or part of the lands, to the tenant.[1] So wherever he has re-acquired the copyhold estate by surrender to his own use, or by escheat, forfeiture, or descent, the copyhold merges in the freehold estate, and the lord may in future grant a freehold estate ;[c] or he may re-grant a copyhold estate. But in the event of his granting a copyhold estate *de novo*, he can neither add to nor diminish the ancient rent or customs in the minutest particular.[d 1]

198. *Subinfeudation.*—It is not competent for the copyholder to create a tenure between himself as a sub-lord of the manor, and a third party as his villein.[2] Each copyholder can only at most part with the estate which he has out and out, so that the alienee may thereafter hold directly of the lord of the manor, as he himself did.

199. *Lord of the manor alienating.*—The lord of the manor having the freehold, alienates his estate in fee-simple, like any other tenant in fee-simple. His alienee or heir-at-law is not obliged to

[a] 3 & 4 W. IV. c. 74, § 50.
[b] 3 & 4 W. IV. c. 74, § 77.
[c] 1 Watk. Cop. 93, 361 ; 2 Bl. Com. 370.
[d] Co. Cop. § 41.

IN SCOTLAND.

[1] *Contra ;* the superior (and any vassal may become a superior by granting his land to hold *de se*) can change the feu-duty and other incidents as he pleases, whenever he has re-acquired the feu or vassal's estate, by resignation *ad remanentiam* (surrender to the use of the lord), and is in a position to re-grant to new vassals. It does not, however, always follow that when the superiority and the vassal's estate come to be vested in the same person, the estates are consolidated (merged). Bell's Pr. § 821. And the superior cannot alter the feu-duty, where there has been a resignation *in favorem*, as where an entry is to be given to an heir or purchaser on the death of, or alienation by, the former vassal.

[2] *Contra ;* the vassal may sub-feu, and his sub-vassal may in turn sub-sub-feu, and so on *ad infinitum ;* and on each subinfeudation a feu-duty may be reserved.

resort to the Crown for any confirmation or recognition of his title.[1]

200. *Enfranchisement of copyholds.*—The inconveniences arising from the restrictions inherent in all copyhold estates, as well as from the irksomeness of the incidents of fines, heriots, rents, and reliefs, lately led to several statutes, which have enabled the lord or copyholder to enfranchise the copyhold, and convert it into a freehold. The enfranchisement of copyholds at first was voluntary ;[a] but now the enfranchisement is compulsory [2] at the instance either of the lord or of the tenant.[b] If the tenant desires enfranchisement, he must give notice of such desire to the lord, and state the consideration he is willing to pay to the lord. If the parties do not agree, then the sum is to be ascertained under the direction of the copyhold commissioners by a valuer, appointed by the parties themselves, or by two valuers, one appointed by each party, and an umpire. The commissioners then make the award of enfranchisement in terms of the valuation. The consideration may be a gross sum of money immediately payable, in which case the tenant may charge the same upon the land. Such charge may be made for a principal sum and interest, or for a series of periodical payments, which, after a time, shall leave

[a] 4 & 5 Vic. c. 35 ; 6 & 7 Vic. c. 23 ; 7 & 8 Vic. c. 55.
[b] 15 & 16 Vic. c. 51 ; 21 & 22 Vic. c. 94.

IN SCOTLAND.

[1] *Contra ;* a superior, being at the highest only a Crown vassal, is subject to the same restrictions as other vassals. His disponee or heir must go to the Crown for crown charters, and make up titles of the same complicated description. Some of these are now, however, shortened or reduced to a mere form by the Titles to Land Act, 21 & 22 Vic. c. 76.

[2] Though the incidents of the vassal's estate very closely resemble those of the copyhold tenure, in their vexatious feu-duties, reliefs, compositions, and non-entries, and though, notwithstanding the abolition of many forms by 21 & 22 Vic. c. 76, the multiplicity of deeds still further aggravates the evils, yet no statute has passed, nor has any attempt been made, either to prohibit subinfeudation as regards the future, or to compel enfranchisement as regards the past. Vassalage or the feudal tenure has these advantages over copyhold, that the customs are uniform and not varying with each locality, and the vassal has a larger estate, which, in fact, equals a freehold. On the other hand, the copyholder's conveyancing is distinguished by a rude simplicity, and as subinfeudation by the copyholder is prohibited, the complexity arising from the double set of titles is very much avoided.

the land discharged. In the same way, if the lord purchases the tenant's interest, he may charge the land with the enfranchisement moneys.[a] The act also provides for the extinguishment of heriots due by custom from freeholders.[b] But the act does not interfere with the lord's right to the mines or minerals under the lands which may be enfranchised; and it enables the tenant to make roads and build upon the surface.[c] The costs of a compulsory enfranchisement may be made a charge on the land, along with the consideration money.[d] When enfranchised, the lands are held in all other respects under the freehold tenure, without being subject to any custom whatever.

CHAPTER X.

TRUSTS.

201. *Origin of trusts.*—Previously to the reign of Henry VIII., the person to whom a gift of lands was made, and seisin delivered, was in point of law the true owner of the land; but a court of equity, wherever such lands were given to the use or benefit of a third person, compelled the legal owner to hold them entirely for that third person's benefit. Owing to the great inconveniences arising from the ecclesiastics so extensively eluding the statutes of mortmain by means of this state of the law, the Statute of Uses[e] was passed for transferring uses into possession. That is to say, if lands had been granted to A and his heirs to the use of B and his heirs, then before the statute A would have had the estate in fee-simple at law; whereas, after the statute, B would have such estate in fee-simple at law.[f] Hence in a feoffment or conveyance of an estate in fee-simple to B, it is expressed to be unto and *to the use of* B and his heirs.[g] The Statute of Uses was intended to put an end to the jurisdiction of the Court of Chancery over landed estates, but that court soon regained

[a] 21 & 22 Vic. c. 94, § 21.
[b] 21 & 22 Vic. c. 94, § 7. See *ante*, § 181.
[c] 21 & 22 Vic. c. 94, § 14.
[d] 21 & 22 Vic. c. 94, § 24.
[e] 27 Hen. VIII. c. 10.
[f] 1 Sand. Uses, 65 *et seq.*; 2 Bl. Com. 328.
[g] See *Hopkins* v. *Hopkins*, 1 Atk. 591; 1 Sand. Uses, 277, (5th ed.)

its ascendancy in another way.[a] [1] The courts soon decided that there could not be a use upon a use.[b] Hence, if an estate in fee-simple was given to A and his heirs, to the use of B and his heirs, to the use of C and his heirs, the Court held that B had the legal estate under the Statute of Uses;[c] but inasmuch as it would be inequitable that C should have no interest, B was said to hold in *trust* for C. Thus trusts came to be the new name instead of the ancient name of uses, and to this day, when a person conveys his estate in fee-simple to trustees, he conveys it *to the use of* the trustees and their heirs *in trust* for the *cestui que trust* and his heirs, etc.

202. *Trusts in courts of law and equity.*—The *cestui que trust* is said to have an equitable estate.[2] But a court of law takes no notice of such estate, looking only to what is called the legal estate in the trustee, a court of equity on the other hand protecting the equitable estate. In the construction and regulation of trusts, equity is said to follow the law, that is, to adopt the rules of law as applicable to legal estates.[d] But it is still true, that in a court of law A is held to be the owner of an estate, while in a court of equity B is held, at one and the same time, to be the owner of the same estate.[3] A is said to have a dry legal estate.

203. *Classification of trusts.*—Trusts are divided generally into simple trusts and special trusts.[4] Simple trusts are those in which

[a] *Chudleigh's* Case, 1 Rep. 124; 2 Bl. Com. 335.
[b] 2 Bl. Com. 333.
[c] *Doe d. Lloyd* v. *Passingham*, 6 B. & C. 305.
[d] 1 Sand. Uses, 269.

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[1] Trusts have existed from the earliest period, and the Legislature only interfered by stat. 1696, c. 25, to declare more clearly by what evidence trusts must be established. Trusts, as a system, are, however, less fully developed even to the present day, probably owing to the early establishment of entails, which more than satisfied the wants of those who would otherwise have resorted to the machinery of trusts for the purpose of family settlements and other complicated dispositions of property.

[2] *Contra;* the beneficiary is not said to have a separate estate, but a *jus crediti;* yet the right is substantially the same.

[3] There being no subdivision of Courts into those of law and equity, these contradictory results are avoided.

[4] Trusts are divided, in a corresponding manner, into proprietory and accessory. Proprietory trusts are often in form absolute dispositions with backbonds, but now the usual form is that where the trust is in *gremio, i. e.,* where the trust appears *ex facie.* Accessory trusts are where a special purpose is to be carried out.

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the trustee holds the legal estate, subject to the duties implied by a court of equity. Special trusts are those in which the trustee has some special purpose to execute or carry out.[a]

204. *Trusts, how declared.*—Trusts at common law might be declared by parole.[b] [1] But no parole evidence was allowed to contradict a written instrument [c] which expressly or impliedly contained a trust.[d] And now, since the Statute of Frauds, though an express trust concerning land and chattels real need not be declared in writing, yet it can only be proved by some writing.[e] [2]

205. A trust, however, concerning personal estate, may be created and proved by mere parole declarations;[f] [3] but there is an exception as to leasehold estates.[g]

206. *Writing, how signed.*—The writing, when required in evidence, must, in general, be signed by the party "by law enabled to declare the trust," and not by the trustee.[h] [4] But the Statute of Frauds will be satisfied, if the trust can be manifested by any subsequent acknowledgment in writing by the trustee.[i] The signature of the party is sufficient to make the writing conclusive, and the writing does not require to be executed as a deed.[j] [5]

[a] Lewin on Trusts, 23.
[b] *Fordyce* v. *Willis*, 3 Bro. C. C. 587; *Bellasis* v. *Compton*, 2 Vern. 294.
[c] *Ibid. Lewis* v. *Lewis*, 2 Ch. Rep. 77.
[d] *Ibid. Pilkington* v. *Bailey*, 7 Bro. C. C. 526.
[e] Stat. Frauds, 29 Ch. 2, c. 3, § 7; *Forster* v. *Hale*, 3 Ves. 707; 5 Ves. 315.
[f] *Fordyce* v. *Willis*, 3 Bro. C. C. 587; *Bayley* v. *Boulcott*, 4 Russ. 347; *M'Fadden* v. *Jenkyns*, 1 Hare 461; 1 Phil. 157; *Hawkins* v. *Gardner*, 2 Sm. & G. 451.
[g] *Riddle* v. *Emerson*, 1 Vern. 108; *Gardner* v. *Rowe*, 5 Russ. 258.
[h] Stat. 29 Ch. 2, c. 3, § 7; *Tierney* v. *Wood*, 19 Beav. 330.
[i] *Ambrose* v. *Ambrose*, 1 P. Wms. 321; *Bellamy* v. *Burrow*, Rep. t. Talb. 97; *Forster* v. *Hale*, 3 Ves. 696; 5 Ves. 308; *Bentley* v. *Mackay*, 15 Beav. 12.
[j] *Ibid. Denton* v. *Davis*, 18 Ves. 503.

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[1] *Contra* as regards land.

[2] The same, by Stat. 1696, c. 25. *Taylour* v. *Crawford*, 12 S. D. 39; *M'Farlane* v. *Fisher*, 15 S. D. 978; *Montgomery*, 7th Feb. 1811, F. C. But an admission that a trust originally existed, coupled with absence of proof of any change, has been held enough. *Walker* v. *Buchanan*, 20 D. B. M. 259.

[3] The same so far as regards moveables, which can be sold or transferred by verbal bargain. M. 12,757.

[4] *Contra*; it must be signed by the trustee. Stat. 1696, c. 25. M. 12,755.

[5] The same; it seems the writing need not be probative, (*i. e.*, duly attested) nor holograph. *Taylor* v. *Crawford*, 12 S. D. 39; *Bryson* v. *Crawford*, 14th Nov. 1833, F. C.

207. *Proof by oath of trustee.*—The existence of a trust cannot be proved by putting it to the oath of the alleged trustee, as an equivalent for the necessary writing; though his evidence given on oath may, in many cases, be an element in the question, whether a trust exists.[a] [1]

208. *The legal estate in the trustee.*—The legal estate is, in ordinary cases, vested in the trustee, who is thus absolute owner,[2] subject to his being liable in a court of equity to account; but where there is merely a special trust, *e. g.* a trust to convey the estate to raise a sum of money, etc., then the legal estate does not vest.[b] The rule of construction adopted on this point is, that wherever a trust is created, a legal estate sufficient, but not more than sufficient, for the execution of the trust is implied. Thus, a trust to sell confers the fee on the trustee.[c] So it seems a trust to lease for an indefinite number of years,[d] or to raise money by a sale.[e]

209. Wherever the trust is created by *will*,[3] the fee-simple is presumed to be given, unless a lesser estate is expressly or impliedly given.[f]

210. Trust property in the hands of trustees is not subject to forfeiture or escheat[g] when the trustee dies without heirs, or is attainted or convicted, and the Court of Chancery will make an order vesting the estate in other persons.

[a] *Hampton* v. *Spencer*, 2 Vern. 288; *Nab* v. *Nab*, 10 Mod. 404.
[b] Lewin on Trusts, 246.
[c] *Villiers* v. *Villiers*, 2 Atk. 72; *Gibson* v. *Montfort*, 1 Ves. 485.
[d] *Doe* v. *Willan*, 2 B. & Ald. 84; Lewin on Trusts, 249.
[e] Lewin on Trusts, 256.
[f] 1 Vic. c. 26, § 30, 31.
[g] 13 & 14 Vic. c. 60, § 15, 19, 46.

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[1] *Contra;* by Stat. 1696, c. 25, by reference to the trustee's oath, the trust may be established. *Leckie* v. *Leckie*, 27 Sc. Jur. 13.

[2] The trustee does not get the entire legal estate, but the truster retains the radical fee, and the interest of the trustee is merely a burden or charge on the fee. Hence the truster, in a trust for payment of debts with a power of sale, though the trustee has been infeft, is not divested, and can, notwithstanding, execute an entail of the fee. *Macmillan* v. *Campbell*, 7 W. S. 441; see also *Gardner* v. *Ogilvie*, 20 D. B. M. 105. But though the trust is in the nature of a burden on the fee, the trustee must be infeft, and the conveyance registered, before his title is complete.

[3] *Contra;* no lands can be conveyed by will, but only by a deed of *de presenti* disposition. A power may be reserved by the deed to name another beneficiary by a deed executed on deathbed; *Ker* v. *Ker's Trs.*, 5 W. S. 718; or a destination may be introduced to such person as the granter may afterwards name, and a subsequent nomination will be sufficient. *Corbet* v. *Porterfield*, 5 W. S. 515.

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211. *General powers of trustee.*—The trustee may convey, assign, or encumber the trust-estate like other owners. He may also devise [1] or bequeath it. He has the privileges and burdens of the legal estate. He must bring any action in a court of law relating to the estate in his own name.[a] And he must in general prove for a debt, due to the estate, in bankruptcy.[b] He cannot, however, vote for members of Parliament, the *cestui que trust* being declared by statute the proper party.[c] [2] If the trustee become bankrupt, the trust-estate does not vest in his assignees;[d] and he may sue his assignees in his own name for the trust property.[e] So if the trustee become insolvent.[f] The real estate held by the trustee will be taken in execution under an *elegit* issuing on a judgment at common law; but on application to the Court of Chancery by the *cestui que trust*, the estate will be protected.[g]

212. *Trusts, how far enforced.*—Where there is a valuable consideration for the trust, and a trust was intended to be created, a court of equity will in general carry it out, if not as a trust, then as a contract for value. But though there is no valuable consideration, it is not necessary that there must have been a transmutation of possession, so as to divest the seller, for the trust will be supported, if it was once clearly created.[h] A mere intention to create a trust will, however, not be treated as the creation of a trust.[i] If the settlor execute an express declaration of trust of his property, whether legal or equitable, this will be treated as a perfectly created trust.[j] But if the trust was not complete, and the transaction voluntary, it will be inefficient at law, and a court of equity will not assist the party having interest to do anything to carry out the trust.[k] And

[a] *Allen* v. *Imlott*, Holt 641; *May* v. *Taylor*, 6 M. & Gr. 261.
[b] Exp. *Green*, 2 Deac. & Ch. 116.
[c] 6 Vic. c. 18, § 74.
[d] 12 & 13 Vic. c. 106, § 141, 142; *Scott* v. *Surman*, Willes, 402; *Houghton* v. *Kœnig*, 18 C. B. 235.
[e] *Winch* v. *Keely*, 1 T. R. 619.
[f] 1 & 2 Vic. c. 110, § 37, 57; 5 & 6 Vic. c. 116, § 1; 7 and 8 Vic. c. 96, § 4, 17.
[g] *Finch* v. *E. Winchelsea*, 1 P. Wms. 277; *Langton* v. *Horton*, 1 Hare, 560.
[h] *Ellison* v. *Ellison*, 6 Ves. 662; *Beech* v. *Keep*, 18 Beav. 285; *Scales* v. *Maude*, 6 De G. M. & G. 43.
[i] *Colleen* v. *Missing* 1 Mad. 176.
[j] Exp. *Pye*, 18 Ves. 140; *Bridge* v. *Bridge*, 16 Beav. 315; *Gray* v. *Gray*, 2 Sim. N. S. 273.
[k] *Ibid*; *Garrard* v. *L. Lauderdale*, 2 Russ. & M. 452; *Searle* v. *Law*, 15 Sim. 95; *Weale* v. *Ollive*, 17 Beav. 252.

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[1] *Contra.* See *ante*, § 209 *n.*

[2] *Contra.*

even when the legal interest is not capable of a legal transfer, as a chose in action, it seems that a declaration of gift will be carried out by the Court.[a] Where the subject of the trust is an equitable interest, the owner can effectually create a trust by assigning it to a new trustee, and the settlor's assent is not necessary.[b]

213. A voluntary conveyance of land in trust cannot be revoked by another voluntary settlement, but may be defeated by a subsequent sale for value to a purchaser even with notice ; [c] yet a voluntary settlement of chattels personal cannot be defeated by a subsequent sale.[d] So a voluntary settlement, either of real or personal estate, by a person insolvent or largely indebted, is void against creditors.[e] Where a person has executed an agreement without consideration under his hand and seal, the assignee can sue on it at law, because a consideration is implied, yet a court of equity will, in general, not execute the contract in favour of volunteers.[f]

214. An agreement founded only on a meritorious consideration, as a conveyance to a wife or child, will not be executed against the settlor himself, nor, it seems, against volunteers claiming under him.[g] [1]

215. *Object of the trust.*—Though the intention of the settlor is in general the sole guide to which a court of equity looks in carrying it out, yet the object of the trust must be in conformity to the law. Thus, a trust so contrived as to create a perpetuity, will not be allowed any more than a perpetuity of the legal estate.[h] So a trust for accumulation of rents will not be permitted beyond the lives of persons in existence, and twenty-one years more ; and if the trust exceed that limit, it is void *in toto*, and not merely *pro tanto*.[i] The Thellusson

[a] *Kekewich* v. *Manning*, 1 De G. M. & G. 187.

[b] *Ibid; Voyle* v. *Hughes*, 2 Sm. & G. 18.

[c] 27 Eliz. c. 4 ; *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84.

[d] *Bell* v. *Cureton*, 2 My. & K. 503 ; *M'Donnel* v. *Hesilridge*, 16 Beav. 346.

[e] *Fletcher* v. *Sidley*, 2 Vern. 490 ; Re *Magawley*, 5 De G. & Sm. 1 ; *Jenkin* v. *Vaughan*, 3 Drew. 419 ; 13 Eliz. c. 5.

[f] *Hale* v. *Lambe*, 2 Ed. 294; *Newton* v. *Askew*, 11 Beav. 145 ; *Kekewich* v. *Manning*, 1 De G. M. & G. 188.

[g] *Antrobus* v. *Smith*, 12 Ves. 39 ; *Jefferys* v. *Jefferys*, 1 Cr. & Ph. 138 ; Lewin on Trusts, 99.

[h] *Duke of Norfolk's* case, 3 Ch. Cas. 20 ; 1 Vern. 164.

[i] *Marshall* v. *Holloway*, 2 Sw. 492 ; *Boughton* v. *James*, 1 H. L. Cas. 406 ; *L. Southampton* v. *M. Hertford*, 2 V. & B. 54 ; *Scarisbook* v. *Skelmersdale*, 17 Sim. 187.

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[1] *Contra ;* no consideration in such a case would be necessary.

Act[a][1] restricts the period of accumulation still further, but if the limit is exceeded, the trust will be held good *pro tanto*.[b]

216. *Restriction on alienation.*—It is in general incompetent to create a trust in favour of A, so that he shall not alienate his interest, or so that such interest shall not pass, on the bankruptcy or insolvency of A, to A's assignees; for whenever the interest of A has vested, such interest cannot be prevented from passing to his assignees.[c][2] But property may be settled by a third party upon A, until A alienate or become bankrupt or insolvent, with a limitation over to B on such event happening; though A could not settle his own property in such a manner. So a third party might give the property to A, subject to the proviso that on the happening of either of those events, the estate shall shift over to B.[d]

217. A trust of lands cannot be declared in favour of a corporation without a license[3] from the Crown,[e] nor can civil corporations declare a trust, nor alienate their property in trust, without the consent of the Lords of the Treasury, for they are themselves trustees of their property for public purposes.[f]

218. Where a trust has been created for an unlawful or fraudulent purpose, a court of equity will not assist either the settlor or the *cestui que trust* in recovering the estate or enforcing the trust.[g] But in general a court of equity will enforce or administer a trust at the instance of the *cestui que trust*, or even other parties having a bene-

[a] 39 & 40 Geo. III. c. 98.

[b] *Griffiths* v. *Vere*, 9 Ves. 127; *Crawley* v. *Crawley*, 7 Sim. 427; *Att.-Gen.* v. *Poulden*, 3 Hare, 555.

[c] *Snowdon* v. *Dales*, 6 Sim. 524; *Green* v. *Spicer*, 1 Russ. & M. 395; *Graves* v. *Dolphin*, 1 Sim. 66.

[d] *Shee* v. *Hale*, 13 Ves. 404; *Lewes* v. *Lewes*, 6 Sim. 304; *Phipps* v. *L. Ennismore*, 4 Russ. 131; *Rochford* v. *Hackman*, 9 Hare, 475; *Sharp* v. *Cosserat*, 20 Beav. 470.

[e] Shep. Touch. 509.

[f] 5 & 6 W. IV. c. 76, § 94.

[g] *Cottington* v. *Fletcher*, 2 Atk. 155.

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[1] The Thellusson Act originally applied to Scotland as to moveables (*E. Strathmore*, 5 W. S. 170; *M'Leish*, 3 D. B. M. 914), and was extended as to heritage in 1848 by the Rutherfurd Act, 11 & 12 Vic. c. 36, § 41. But the latter statute, and consequently the Thellusson Act itself, do not affect deeds made prior to 14th August 1848. *Keith's Trs.* v. *Keith*, 19 D. B. M. 1040.

[2] *Contra*; in gratuitous trusts, and, it seems, in all trusts except for creditors, the beneficiary may be effectually prevented from alienating. Forsyth on Trusts, 328.

[3] *Contra*; no license necessary.

ficial interest, giving redress against any breach of trust; and it has been held that a trustee was not precluded from seeking redress against the breach of a co-trustee deceased, by reason of his having taken administration to his estate.[a]

219. *Acceptance or refusal of trust.*—The trustee of real property, if he refuses to act, is not safe unless he executes a formal disclaimer by deed.[b] [1] Yet it seems a disclaimer by parole is sufficient;[c] and a disclaimer of a trust of chattels may be proved by parole.[d] Acceptance of the office may be proved either by the trustee expressly signing the deed, or expressly assenting, or by acting in execution of the trust, which implies assent.[2] After acceptance, or after acting in the trust, the trustee cannot renounce the office, and can only be released by a court of equity, or by virtue of a power in the trust-deed, or the universal consent of the *cestuis que trust.*[e] [3]

220. *Resulting trusts.*—Trusts which arise by operation of law, are generally known as resulting trusts and constructive trusts. *First*—Of Resulting Trusts.

221. *Disposition of the legal, but not the equitable estate, etc.*—Where the owner of an estate, to which he is both legally and equitably entitled, disposes by will or deed only of the legal estate, and nothing is said or can be reasonably inferred as to the equitable estate, there is a resulting trust of such equitable estate to himself, and his heirs or executors, as the case may be.[f] And where an estate is granted to a stranger without consideration, and no trust is declared as to any part, it seems the whole beneficial interest will result to the

[a] *Groves* v. *Groves*, 3 Y. & J. 163; *Miles* v. *Durnford*, 2 De G. Mac. & G. 643.
[b] *Stacy* v. *Elph*, 1 M. & K. 199; *Urch* v. *Walker*, 3 M. & C. 702.
[c] *Doe* v. *Harris*, 16 M. & W. 517.
[d] *Ibid.* Shep. Touch. 285; 1 Vent. 130.
[e] *Doyle* v. *Blake*, 2 Sch. & Lef. 245.
[f] Lewin on Trusts, 177.

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[1] In both cases, parole proof of non-acceptance is enough. *Davidson*, 13 S. D. 1082; *Bannerman*, 5 D. B. M. 229.

[2] The trustee, to complete his title, must be infeft, if it is heritable property, M. 15,207; or must take possession or give intimation of assignation, if it is moveable property. *Fraser*, 8 S. D. 982.

[3] A trustee has been allowed to revoke his consent to act, the position of the parties not having been altered. *Bannerman*, 5 D. B. M. 229. So the Court will release the trustee on good grounds. *Hill* v. *Mitchell*, 9 D. B. M. 239; *Dick* v. *Pridie*, 17 D. B. M. 835.

settlor;[1] but if the grant is to a wife or son, it is presumed an advancement to them.[a] So where a trust is declared as to a part only of the estate, and nothing is said as to the residue, the equitable interest undisposed of results to the settlor.[b] Sometimes it is difficult to distinguish whether a trust is intended to be declared, or a gift is made of the estate to the trustee, subject to a charge; and this is a question of construction of the whole instrument creating the trust.[c] In such cases of trusts by presumption of law, parole evidence[2] will be admitted to prove that the settlor meant the alleged *cestui que trust* to take the surplus interest absolutely;[d] but parole evidence will not be allowed to rebut a presumption of trust arising on a written instrument.[e]

222. In cases where the property is settled for charitable purposes, a different presumption applies, for the donor is presumed to give the surplus, if any, to the corporation, where the proceeds are not exhausted in the proper objects of the trust; and when the profits of the lands at the time are exhausted in the charity, but afterwards there is a surplus owing to the increased value of the lands, it is a question of construction whether the surplus was also to be applied to the same object, or was to be enjoyed absolutely by the corporation.[f][3]

223. *Constructive trusts.*—A constructive trust is raised when the trustee has, by virtue of his position as trustee, acquired some per-

[a] *D. Norfolk* v. *Brown*, Pr. Ch. 80; *Baylis* v. *Newton*, 2 Vern. 28; Lewin on Trusts, 177.

[b] *Cottington* v. *Fletcher*, 2 Atk. 155; *Nash* v. *Smith*, 17 Ves. 29; *Mapp* v. *Elcock*, 3 H. L. Cas. 492.

[c] *King* v. *Denison*, 1 V. & B. 272. Lewin on Trusts, 193.

[d] *Gainsborough* v. *Gainsborough*, 2 Vern. 253, *Cook* v. *Hutchinson*, 1 Keen, 50.

[e] *Langham* v. *Sanford*, 17 Ves. 442; 19 Ves. 643.

[f] *Mayor of Beverley* v. *Att.-Gen.*, 6 H. L. Cas. 310, reviewing the authorities.

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[1] In trusts by operation of law, any surplus over and above what is exhausted by the purposes of the trust belongs to the heir-at-law of the truster. M'Leish, 3 D. B. M. 914; *Hill* v. *Burns*, 2 W. S. 91.

[2] *Contra;* the proof to establish a trust must be by the writ or oath of the trustee. *Chalmers* v. *Chalmers*, 7 D. B. M. 865.

[3] There is no distinction between trusts for charities and other cases, and the heir-at-law of the truster will take on the failure of the trust. M'Leish, 3 D. B. M. 914. See *Jack* v. *Burnet*, 5 Bell's Ap. 409.

sonal advantage or profit, as where a trustee has got the renewal of a valuable lease in his own name.[a]

224. *Purchase in name of third person.*—Wherever a person purchases a legal estate in the name of himself and others, or of others without himself, a trust of this estate results in favour of the person who actually advances the purchase-money as a purchaser.[b] [1] This rule applies to personal as well as real estate.[c] So, if several persons club for the consideration money, there is a resulting trust of part of the estate corresponding to the share advanced by each.[d] And the person who really paid the purchase-money may prove by parole that fact, though the deed expresses it otherwise;[e] and so the nominal purchaser may rebut by parole the presumption.[f]

225. But where a purchase is made by a father in the name of a child, instead of a resulting trust, the presumption is, that a provision was intended, and the child takes absolutely.[g] [2] Yet this presumption may be rebutted if the child has been already fully provided for, which is a mere question of intention to be inferred from circumstances connected with the purchase.[h] The same rule applies to a wife as well as a child, and sometimes to a grandchild, but does not extend to a nephew.[i]

226. *Trustee's liability for co-trustee.*—A trustee is not liable for the act or default of his co-trustee, though no proviso [3] to that effect

[a] *Pickering* v. *Vowles*, 1 Bro. C. C. 197; *James* v. *Dean*, 11 Ves. 383, 15 Ves. 236. Lewin on Trusts, 216.

[b] *Redington* v. *Redington*, 3 Ridg. 177; Ex p. Houghton, 17 Ves. 251; *Trench* v. *Harrison*, 17 Sim. 111. Lewin on Trusts, 200.

[c] *Ibid; Rider* v. *Kidder*, 10 Ves. 360; *Sidmouth* v. *Sidmouth*, 2 Beav. 447.

[d] *Wray* v. *Steele*, 2 V. & B. 388; *Aveling* v. *Knipe*, 19 Ves. 441.

[e] *Ryall* v. *Ryall*, 1 Atk. 59; *Lench* v. *Lench*, 10 Ves. 517.

[f] *Rider* v. *Kidder*, 10 Ves. 360; *Benbow* v. *Townsend*, 1 My. & K. 506.

[g] *Dyer* v. *Dyer*, 2 Cox, 93; *Sidmouth* v. *Sidmouth*, 2 Beav. 454.

[h] *Grey* v. *Grey*, 2 Swanst. 600; *Lloyd* v. *Read*, 1 P. Wms. 608; *Redington* v. *Redington*, 3 Ridg. 190.

[i] *Kingdome* v. *Bridges*, 2 Vern. 67, 683; *Langfield* v. *Hodges*, Lofft, 230; 2 Cox, 96.

IN SCOTLAND.

[1] *Contra;* there is no presumption of a resulting trust. *Spence* v. *Ross*, 3 W. S. 380. *Macintosh* v. *Macintosh*, 28th Jan. 1812, F. C. *Collie* v. *Pirie*, 13 D. B. M. 506. *Balvaird* v. *Balvaird*, 5th Dec. 1816, F. C.

[2] The same. *Ibid.*

[3] So, it seems, a special provision in the deed is not necessary. *Seton* v. *Dawson*, 4 D. B. M. 310. *Moffat* v. *Robertson*, 12 S. D. 369.

is contained in the deed.[a] Nor is he fixed with liability where he merely joined *pro forma* in signing a receipt, though it lies on him to prove in such a case that he did not actually receive the money.[b] But in signing a receipt *pro forma*, the trustee who did not receive the money will be liable[1] if he allowed the money to remain in the co-trustee's hands an unreasonable time.[c]

227. *Trustee making profit of the trust.*—It is a general rule of equity that no trustee shall derive any personal advantage from his trust.[d] Hence, also, where a trustee employs the trust-funds in any commercial speculation, though he must bear the whole loss, if any, yet he must account for the whole profit[2] to the *cestui que trust.*[e] So, if a trustee acts as solicitor,[3] he cannot charge the estate except for costs out of pocket, nor can his firm so charge,[f] unless there is a special contract to that effect.[g]

229. Where the *cestui que trust* dies without an heir or next of kin, the trustee, as legal proprietor, takes the real estate absolutely, for there is nobody to call him to account.[h 4] But if the estate is

[a] *Leigh* v. *Barry*, 3 Atk. 584; *Williams* v. *Nixon*, 2 Beav. 472.

[b] *Brice* v. *Stokes*, 11 Ves. 234; *Westley* v. *Clarke*, 1 Ed. 359; *Walker* v. *Symonds*, 3 Sw. 64.

[c] *Ibid.* *Bone* v. *Cook*, Macclell. 168.

[d] *Burgess* v. *Wheate*, 1 Ed. 226; *Bentley* v. *Craven*, 18 Beav. 75.

[e] *Docker* v. *Somes*, 2 My. & K. 664; *Parker* v. *Bloxam*, 20 Beav. 295.

[f] *Collins* v. *Carey*, 2 Beav. 128; *Lincoln* v. *Windsor*, 9 Hare 158.

[g] Re *Sherwood*, 3 Beav. 338. The case of *Cradock* v. *Piper*, 1 Mac. & Gord. 664, where one of the trustees, a solicitor, acted for himself and the others, and received full costs, is discredited. *Manson* v. *Baillie*, 27 Sc. Jur. 526; *Broughton* v. *Broughton*, 5 De G. M. & G. 160.

[h] *Burgess* v. *Wheate*, 1 Ed. 177; *Attorney-Gen.* v. *Sands*, Hard. 496; *Henchman* v. *Att.-Gen.* 3 M. & K. 485.

IN SCOTLAND.

[1] It seems the same. *Blair* v. *Paterson*, 14 S. D. 361; *Seton* v. *Dawson*, 4 D. B. M. 310; *Urquhart* v. *Brown*, 5 D. B. M. 1142; *Watson*, 5 D. B. M. 1182.

[2] *Contra;* he is not bound to account for the whole profit made by third parties to whom the trust money was wrongly lent. *Laird* v. *Chisholm*, 20 D. B. M. 972; 17 D. B. M. 984; *Campbell* v. *Black*, 19 D. B. M. 1019; 17 D. B. M. 321.

[3] The rule is the same. *Home* v. *Pringle*, 2 Rob. Ap. 438; *Manson* v. *Baillie*, 27 Sc. Jur. 526; 2 Macq. 80. But the Court has held that if a truster say, "I authorise my trustees to appoint one of their number or other fit person an agent or factor," this implies that a trustee, appointed the solicitor, may charge ordinary costs. *Goodsir* v. *Graham*, 20 D. B. M. 1141.

[4] *Contra;* it goes to the Crown as *ultimus hæres*. Finnie, 15 S. D. 165; Torrie, 10 S. D. 597.

personalty, consisting of either real or personal chattels, it falls to the Crown as *bonum vacans.*[a] If the *cestui que trust* is attainted, neither he nor his issue could assert any claim.[b]

230. *Duty to get possession of funds, and keep safely.*—It is the duty of trustees to get possession of the chattels personal, and place them in a state of security. And, if the trust-fund is a *chose in action*, which may be reduced into possession, they must get it in with reasonable promptitude.[c] [1] So they must call in money lent on mere personal security, though lent by the settlor himself.[d] They may deposit money for temporary purposes in a responsible bank, but must do so to the separate account [2] of the trust estate.[e] Yet they will be liable, if they ought to have invested the money in the funds for improvement.[f]

231. *Investment of trust monies.*—Until the money can be applied to the proper purposes of the trust, the trustee is bound to invest the money in some proper security. He is in no case entitled to lend it on personal security,[g] unless expressly authorised by the settlement;[h] but even then it cannot be lent by way of accommodation.[i] The trustee must not invest in the stock of any private company, even of bank stock, but only in Government stock.[j] If there is no express power in the settlement, the Government securities is the only unobjectionable investment.[k] [3]

232. *Investing in mortgages.*—It is settled that a trustee is not

[a] *Ibid.* *Middleton* v. *Spicer*, 1 Bro. C. C. 201; *Barclay* v. *Russell*, 3 Ves. 424.
[b] Lewin on Trusts, 323.
[c] *Caffrey* v. *Darby*, 6 Ves. 488; *Macgachen* v. *Dew*, 15 Beav. 84; *Wiles* v. *Gresham*, 2 Drewr. 258.
[d] *Caney* v. *Bond*, 6 Beav. 486; *Clough* v. *Bond*, 3 My. & Cr. 496.
[e] *Routh* v. *Howell*, 3 Ves. 565; *Mathews* v. *Brise*, 6 Beav. 239.
[f] *Moyle* v. *Moyle*, 2 Russ. & My. 710; *Darke* v. *Martyn*, 1 Beav. 525.
[g] *Adye* v. *Feuilletean*, 1 Cox, 24; *Watts* v. *Girdlestone*, 6 Beav. 188.
[h] *Forbes* v. *Ross*, 2 Bro. C. C. 430.
[i] *Langston* v. *Ollivant*, Coop. 33.
[j] *Hynes* v. *Redington*, 1 Jon. & Lat. 589.
[k] *Trafford* v. *Boehm*, 3 Atk. 444.

IN SCOTLAND.

[1] It seems the same. Watson, 5 D. B. M. 1182.

[2] The same. Forsyth on Trusts, 232.

[3] Where there is no special description of the kind of investment, the trust funds should be invested in first-class heritable securities, and not in Government funds, for the value of these is liable to fluctuation. House property may be selected, but in that case a larger margin should be taken to protect against depreciation; *Thomson* v. *Christie*, 24 Sc. Jur. 526; 1 Macq. 236.

justified in investing the trust-money on real security[1] when no express power is given.[a] But such a power is generally given. In lending on mortgage, the trustee is bound to see that the estate is of sufficient value, and though there is no artificial limit fixed, the estate should be in value worth double, or at least one half[2] more than the loan.[b] If the trustees are authorised to lend on real security in England, they have an implied power to lend also on real security in Ireland.[c 3]

233. *Liability to pay interest.*—In the event of any delay on the part of the trustee in investing the trust-monies, he will be charged with interest at four per cent,[4] until investment; and if he has employed it in trade, he will be charged either with the profits actually received, or with five per cent, and sometimes with compound interest.[d]

234. *Trustee paying money into Court.*—A trustee, or the major part of the trustees, are now entitled to pay any trust monies lying in their hands into the Bank of England, to the account of the Accountant-General of the Court of Chancery, or to transfer stock held in trust to the same officer, to abide the orders of the Court; and the trustees, on getting a receipt, are discharged for the money or stock so paid or transferred.[e 5] The question, who is beneficially entitled, is tried on a petition to the Court, at the suit of any claimant.

235. *Trustees for sale.*—A trust for sale must in general be carried out with reasonable promptitude, and with due regard to the interests of the several *cestuis que trust.* A trust for sale does not

[a] *Norbury* v. *Norbury*, 4 Mad. 191; Lewin on Trusts, 343.

[b] *Droseer* v. *Brereton*, 15 Beav. 221; *Stretton* v. *Ashmall*, 3 Drewr. 12; *Macleod* v. *Annesley*, 16 Beav. 600.

[c] 4 & 5 W. IV. c. 29.

[d] *Jones* v. *Foxall*, 15 Beav. 392.

[e] 10 & 11 Vic. c. 96; Gen. Orders of C. of Ch.; 12 & 13 Vic. c. 74; 18 & 19 Vic. c. 124, § 22.

IN SCOTLAND.

[1] It is always justifiable, heritable security being considered the safest possible investment.

[2] No artificial rule is fixed as to the relative amount; but the trustee ought to take care that the property is of sufficient value.

[3] *Contra;* there is no statute.

[4] The same. *Clarke* v. *Boswell*, 19 D. B. M. 187; Campbell, 2 D. B. M. 1367.

[5] It is not competent to a trustee to take this step.

imply a power to lease.[a] Nor does it imply a power to mortgage ;[1] but if there is a discretion, the exercise of that discretion cannot be questioned.[b] On the other hand, a power to mortgage does not imply a power to sell.[c]

236. A purchaser is in all cases bound to see to the application of the purchase money,[2] unless a positive intention to the contrary on the part of the settlor be either expressed or implied in the instrument creating the trust.[d] Hence the *cestui que trust* should be required by the purchaser to join with the trustee in signing a receipt for the purchase-money.[e]

237. A trustee for sale is not permitted to purchase the trust estate, however fair the transaction, for this puts his interest in conflict with his duty.[f][3] And if he does so, the *cestui que trust*, unless he has expressly confirmed the purchase, can recover the estate ; but the latter must file his bill in equity to set aside the sale in a reasonable time, which varies according to circumstances.[g] After a trustee has ceased to be a trustee, and has put his *cestui que trust* at arm's length, then he may in general safely purchase.[h]

238. *Trust for payment of debts.*—In trusts for creditors, a distinction is made between traders and non-traders. A non-trader may settle part or the whole of his property in trust for all or some of his creditors.[i] But if the non-trader is insolvent, and he be imprisoned, or petition the Insolvent Court within three months' thereafter, the

[a] *Keating* v. *Keating*, Ll. & G. 133.
[b] *Haldenly* v. *Spofforth*, 1 Beav. 390 ; *Stronghill* v. *Ansty*, 1 De G. M. & G. 635 ; *Rendlesham* v. *Meux*, 14 Sim. 249.
[c] *Drake* v. *Whitmore*, 5 De G. & Sm. 619.
[d] Lewin on Trusts, 452.
[e] *Weatherby* v. *St. Georgio*, 2 Hare, 624 ; *Forbes* v. *Peacock*, 12 Sim. 521.
[f] Lewin on Trusts, 460.
[g] *Campbell* v. *Walker*, 5 Ves. 681 ; *Baker* v. *Reid*, 18 Beav. 398.
[h] *Gibson* v. *Jeyes*, 6 Ves. 277 ; Exp. Lacy, Ib. 626.
[i] *Estwick* v. *Cailland*, 5 T. R. 420.

IN SCOTLAND.

[1] *Contra ;* unless the borrowing amounts to a partial alienation of the trust estate. Dewar, Bell's Ca. 541 ; *M'Leish's Trs.*, 3 D. B. M. 914.

[2] This is not required as to *bona fide* purchasers. Dewar, Bell's Ca. 541. But if the power of sale depends on the performance of some condition which may or may not have been performed, it is otherwise. M. 10,209 ; Cockburn, 14 S. D. 889.

[3] The rule is the same. *Aberdeen R. Co.* v. *Blaikie*, 26 Sc. Jur. 622 ; and 1 Macq. Ap. 461.

settlement will be void as against his assignees.[a] [1] And in all cases, if there is actual fraud, the settlement will be void.[b]

239. If the settlor be a trader, any fraudulent conveyance, if made with intent to defeat or delay creditors, is an act of bankruptcy.[c] But if a trader executes a conveyance to trustees of his whole property for all his creditors, it is no act of bankruptcy unless the settlor be made a bankrupt within three months thereafter, provided the trustees all sign the deed within fifteen days after execution, in presence of an attorney.[d]

240. A trust for creditors, if made for the settlor's convenience, and not communicated to any of the creditors, is revocable at pleasure; but otherwise, if the creditors are informed by the settlor or trustee.[e] [2]

241. *Trustees for charities.*—Where a charity is instituted, the founder and his heirs are the visitors,[3] unless some other has been appointed;[f] and the visitors' decision is final as to all matters of internal government.[g] If the founder's heir cannot be discovered, the visitatorial power results to the Crown, which, as to civil corporations, is committed to the Queen's Bench, and, as to eleemosynary corporations, to the Lord Chancellor.[h] But in all cases of maladministration of property by the governors, the Court of Chancery interferes,[i] and

[a] 1 & 2 Vic. c. 110, § 59; *Jackson* v. *Garnett*, 2 Q. B. 887; *Thompson* v. *Jackson*, 3 M. & Gr. 621.

[b] *Dullen* v. *Morrison*, 17 Ves. 197.

[c] 12 & 13 Vic. c. 106, § 67.

[d] *Ibid*, § 68.

[e] *Wilding* v. *Richards*, 1 Coll. 655; *Nicholson* v. *Tutin*, 2 K. & J. 18.

[f] *Eden* v. *Foster*, 2 P. Wms. 326; *Att. Gen.* v. *Gaunt*, 3 Sw. 148.

[g] *Att.-Gen.* v. *Cath. Hall*, Jac. 392.

[h] Lewin on Trusts, 495.

[i] *Att. Gen.* v. *St. Cross Hospital*, 17 Beav. 435.

IN SCOTLAND.

[1] A trust-deed for creditors, if made by an insolvent within 60 days preceding bankruptcy or after diligence begun, may be challenged by prior creditors, under the stat. 1696, c. 5. *E. Rosebery* v. *Macqueen*, 2 S. D. 315. Or, if it be made without consideration in favour, or for the benefit of a conjunct (*e.g.*, a wife or child) or confident person (*e.g.*, an agent) when the granter was insolvent, it may be set aside under the Act 1621, c. 18. As to posterior creditors, they will have no benefit under the deed, if there was no fee left in the truster by the conveyance. *Globe Ins. Co.* v. *Murray*, 17 D. B. M. 216.

[2] So if the creditors accede to the deed, which may be by an express deed of accession, or by acts and conduct, the trust is binding on both parties. Forsyth on Trusts, 40.

[3] The founder and his heirs have no such right beyond other parties interested. *M'Leish's Trs.*, 3 D. B. M. 914, M. 5755; *Sen. Acad. of Edin.* v. *Mags. of Edin.* 26 Sc. Jur. 520; 1 Macq. Ap. 485.

sees that the object of the charity is carried out, and the funds properly applied.[a] [1] The charity funds can only be diverted into a different channel by an Act of Parliament, or under the intervention of the Charity Commissioners.[b] [2] The Court of Chancery is empowered by statute to alter and extend the system of education in grammar schools.[c]

242. *Trustee delegating trust.*—The trustee cannot delegate his trust to a third person, or to a co-trustee;[d] if he do so, he will be personally responsible for any loss occasioned thereby. But if the testator or settlor expressly authorises the trustee to employ a particular person, the trustee would not be liable, if using ordinary vigilance.[e] [3] And where there is a moral necessity to employ some one, as, for example, in transmitting money, the trustee will be exonerated, if he act in the regular course of business.[f]

243. *One of trustees dying.*—As the trustees are joint tenants, when one dies, the estate survives[4] to the others.[g] This is the case though the deed or settlement contain a power of appointing new trustees, unless it express the contrary.[h]

244. *Joint office of trustees.*—All the accepting trustees form one collective body, and each must in general join in all acts done.[i] It is immaterial in general, whether all the trustees accept the office. It is unusual to declare a certain number of the trustees a

[a] *Att. Gen.* v. *Sherborne School*, 18 Beav. 256.
[b] 16 & 17 Vic. c. 137; 18 & 19 Vic. c. 124.
[c] 3 & 4 Vic. c. 77.
[d] *Turner* v. *Corney*, 5 Beav. 517; *Trutch* v. *Lamprell*, 20 Beav. 116.
[e] *Kilbee* v. *Sneyd*, 2 Moll. 199.
[f] *Clough* v. *Bond*, 3 My. & Cr. 497; *Joy* v. *Campbell*, 1 Sch. & Lef. 341.
[g] *Hudson* v. *Hudson*, Rep. t. Talb. 129.
[h] *Warburton* v. *Sandys*, 14 Sim. 622; *Jacob* v. *Lucas*, 1 Beav. 436.
[i] Ex. p. Griffin, 2 Gl. & J. 116.

IN SCOTLAND.

[1] In cases of difficulty the trustees may themselves raise an action of declarator. The Court will interfere and exercise discretionary powers of trustees of charities. M. 14,703.

[2] There is no general statute regulating the powers of trustees for charities, as to the trust property, education, or otherwise.

[3] The same. Sym, 8 S. D. 741.

[4] The office does not in general survive, without express words of survivorship, except in testamentary nominations. Hence if one die, the surviving trustees are not entitled to act; M. 7446, M. 8047, M. 14,703; unless a quorum is declared and exists. See next note.

quorum.[1] But in public trusts, the act of the majority is held to be the act of the whole number ;[a] and when the body of trustees of a charity is numerous, the Court sometimes, in its order, expresses that a part of them shall form a quorum.[b]

245. *Discharge, failure, and misconduct of trustees.*—Where there was no power in the settlement to appoint new trustees, the Court of Chancery would discharge him.[c 2] Moreover, a trustee may often escape the liabilities of the office[3] by submitting the administration of the trusts to the jurisdiction of the Court of Chancery.[d] As a *cestui que trust* is entitled to have a proper person as trustee, and a proper number of such persons, whenever there was a failure of a trustee or trustees, from refusal or incapacity, the Court of Chancery would appoint a new trustee.[e 4] So the Court would remove a trustee for

[a] *Wilkinson* v. *Malin*, 2 Tyr. 572 ; *Att.-Gen.* v. *Shearman*, 2 Beav. 104.

[b] Lewin on Trusts, 299.

[c] *Forshaw* v. *Higginson*, 20 Beav. 487 ; *Gardiner* v. *Downes*, 22 Beav. 395.

[d] *Ibid.*

[e] 13 & 14 Vic. c. 60 ; 15 & 16 Vic. c. 55. As to charities, *see* 16 & 17 Vic. c. 137, § 28 ; 18 & 19 Vic. c. 124.

IN SCOTLAND.

[1] *Contra;* a certain number was generally declared to be a quorum, who could act without the others ; or one was declared a *sine quo non.* If the quorum did not accept, or one died, the whole nomination failed (M. 14,694, *et seq.*), and a new nomination by the trustee was competent. *Re Wilson*, 36 Sc. Jur. 653. But in trusts *mortis causa*, where no quorum was mentioned, the truster was presumed to have confidence in any one, and the office survived. *Gordon's Trs.* v. *Eglinton*, 13 D. B. M. 672 ; *Ferguson* v. *Marjoribanks*, 15 D. B. M. 637 ; *Findlay*, 17 D. B. M. 1014 ; *Seton* v. *Seton*, 18 D. B. M. 117. Hence a trust is generally conferred on the trustees, and the acceptors and survivors of them.

[2] So a trustee might resign his trust for sufficient cause, but generally required the authority of the Court in an action of declarator or otherwise. *Dick's Trs.* v. *Pridie*, 17 D. B. M. 835 ; *Hill* v. *Mitchell's Trs.*, 9 D. B. M. 239.

[3] In like circumstances the trustee may raise an action of multiplepoinding and exoneration, or of count and reckoning (*Cumming* v. *Hay*, 12 S. D. 508 ; *Darling* v. *Adamson*, 4 D. B. M. 48), which has practically the same effect. But he cannot devolve upon the Court the administration of the funds. See *Tweedie*, *ex p.* 20 D. B. M. 438.

[4] The Court had, at common law, the power to appoint new trustees,

misconduct. The Court also would appoint a receiver in cases of misconduct, if all the *cestuis que trust* applied.[a]

246. *New implied powers in trust-deeds and wills.*—The powers of trustees appointed since 1860 are now enlarged. Trustees for sale have a certain latitude as to selling and applying the proceeds.[b] Trustees having money to invest may, if not prohibited, invest, and vary investments in real security, in any part of the United Kingdom, or in Parliamentary stock, Public funds, or Government securities.[c] Trustees may also appoint new trustees, and are entitled to indemnity and reimbursement; may apply income of infants' portions towards their maintenance, and purchasers are not bound to see to the application of purchase-money.[1]

247. *Cestui que trust's estate.*—The *cestui que trust* has an equitable estate in the trust property. He can, in a trust of lands, compel the trustee to put him into possession,[d] unless where he is not exclusively entitled.[e] The trustee, however, is in general entitled to possession of the title-deeds.[f] The *cestui que trust* has the *jus disponendi* of the legal estate, and may compel the trustee to execute conveyances as directed,[g][2] or his assignee may compel the trustee.[h] But in purchases from the *cestui que trust*, the purchaser should make inquiry at the trustee as to whether there has

[a] Anon, 12 Ves. 5; *Evans* v. *Coventry*, 5 De G. M. & G. 911.
[b] 23 & 24 Vic. c. 145, § 1-10.
[c] *Ibid.*, § 25; 22 & 23 Vic. c. 35, § 32; 23 & 24 Vic. c. 38, § 10-12.
[d] *Brown* v. *How*, Barn. 354; Ib. 150.
[e] Lewin on Trusts, 586.
[f] *Duncombe* v. *Mayer*, 8 Ves. 320.
[g] *Payne* v. *Barber*, O. Bridg. 24; *Penfold* v. *Bouch*, 4 Hare, 271.
[h] *Goodsar* v. *Ellison*, 3 Russ. 583.

IN SCOTLAND.

but in general refused to do so, and appointed a judicial factor (receiver). *Preston's Trs.*, 16 S. D. 457; 2 Rob. Ap. 45; *Fraser*, 16 D. B. M. 867; *Miller* v. *Black's Trs.*, 2 Sh. & M'L. 889; *Preston's Trs.*, 14 D. B. M. 1056; *Scott's Trs.* v. *Douglas*, 36 Sc. Jur. 58.

[1] So new additional powers are now implied in all trust-deeds, viz., power to resign, to assume new trustees, that a majority shall be a quorum, and that each shall be liable only for his own acts and intromissions, and not for omissions; 24 and 25 Vic. c. 84; 26 and 27 Vic. c. 115.

[2] The same. *Gordon's Trs.* v. *Harper*, 1 S. D. 175; *Bushby*, 4 S. D. 110.

been any prior sale or incumbrance, and should give notice[1] to the trustee of his own purchase, so as to obtain priority.[a]

248. *Execution at law against cestui que trust.*—Where a creditor has recovered judgment against a *cestui que trust*, he is entitled to sue out a *fieri facias*, but in most cases the interference of the Court of Chancery is also necessary.[b] So as to real estate, the judgment creditor may, after suing out his elegit, pursue his remedy in the Court of Chancery; and in modern registered judgments he may do so, without having previously sued out an elegit.[c]

249. *Remedy of cestui que trust.*—The *cestui que trust* can in general only pursue his remedy against the trustee in a court of equity. A court of law treats the trustee as the legal owner, and is said to have no organs to see and understand the equitable relations existing between him and the *cestui que trust*.[2]

250. *Prescription.*—The claim of a *cestui que trust* to lands cannot in general be prosecuted after the lapse of twenty years from the time the right to bring the suit accrued.[d][3]

CHAPTER XI.

EASEMENTS AND INCORPOREAL HEREDITAMENTS.

255. An incorporeal hereditament is a right issuing out of a thing corporate, whether real or personal, or concerning, or annexed to, or exerciseable within the same.[e] The chief of those affecting real

[a] *Burrows* v. *Lock*, 10 Ves. 470; *Hodgson* v. *Hodgson*, 2 Keen, 704; *Andrews* v. *Bousfield*, 10 Beav. 511; *Rice* v. *Rice*, 2 Drewr. 73; *Re* Atkinson, 2 De G. M. & G. 140.

[b] *Angell* v. *Draper*, 1 Vern. 399; *Shirley* v. *Watts*, 3 Atk. 200; 1 & 2 Vic. c. 110, § 14; Lewin on Trusts, 646.

[c] *Neate* v. *D. Marlborough*, 3 Myl. & C. 407; *Yescombe* v. *Landor*, M. R. 30th May 1859.

[d] Lewin on Trusts, 732; 3 & 4 W. IV. c. 27, § 24, 25; Sugd. R. P. Stats. 102. See also *post*, § 307.

[e] 2 Bl. Com. 20.

IN SCOTLAND.

[1] The same. *M'Dowall* v. *Russell*, 2 S. D. 682.

[2] The Court of Session is a court of law as well as equity.

[3] The prescriptive period is forty years. *Barns* v. *Hill*, 19 D. B. M. 626. See also *post*, § 307 *n.*

estate are—seignories, annuities, rents, advowsons, tithes, offices, franchises, commons, and easements.

256. *Seignories.*—Before the statute *Quia Emptores*, which prohibited subinfeudation, the seignory of those lands held by tenants in fee-simple at a rent, or on fealty, was the estate which remained in the lord, and to which the rent and fealty were incident. As no owner in fee since that statute could retain a seignory over an alienee, to whom he granted the fee-simple, such a right may be said now to exist only in the case of manors. The lord of the manor who has granted his lands to copyhold tenants, retains his seignory, and in conveying the manor, the seignory, together with all rents incident to it, will be comprised.[a] [1]

257. The lord can distrain for the rent and for reliefs, though not for a fine or a heriot, but he can bring an action for all these within six years.[b] The rent, fine, or relief, is not a charge [2] on the lands.[c]

258. *Annuities.*—An annuity is a yearly sum not payable as interest, charged upon the person of the grantor, or upon him and his heirs. When it is charged on the real estate of the grantor, it is generally called a rent charge.

259. An annuity may be granted by A to B and his heirs, but if the word "heirs" is not added, it will be presumed to be for the life of B only.[d] So if A grant the annuity without binding his own heirs expressly, the annuity will determine with A's life, though expressly granted to B and his heirs.[e]

260. Where an annuity was granted for a valuable consideration,

[a] Perk. 116.
[b] 3 & 4 W. IV. c. 42, § 3.
[c] 1 Scriv. Cop. 356. See *ante*, § 179, 180, 183.
[d] *Yates* v. *Maddan*, 3 Mac. & G. 543.
[e] Co. Litt. 144 *b*.

IN SCOTLAND.

[1] The superiority is in like manner the right of the superior to the feu-duties and casualties. Nearly all the lands in the country are held of superiors, who can sell the superiorities. *Hamilton* v. *Bogle*, 1 Ross, L. C. 33. The superior's right, as regards the feu-duties, is made effectual in the following way:—He can poind the ground (*i. e.* distrain), and has a hypothec (or lien) over the crop, etc. He can sue the vassal in a personal action, and he can irritate the feu *ob non solutum canonem* (*i. e.* the feu may be forfeited). Moreover, the feu-duty is a real security over the land (*i.e.* a charge). See *ante*, § 179 *n.*

[2] *Contra.* See last note, and *ante*, 179 *n*, 180 *n*, 183 *n*.

a memorial of the deed was required by statute to be enrolled[1] in the Court of Chancery within thirty days after its execution; and though the statute for the abolition of the usury laws repealed that enactment,[a] yet, since 1855, the deed (if not a marriage settlement), or the will granting the annuity must be registered in the Court of Common Pleas.[b]

261. An annuity to B and his heirs will go to B's heir, yet not by descent, for it is personal estate,[2] and passes by will under a bequest of personal estate.[c]

262. *Rents.*—A rent is a certain profit issuing yearly out of lands in hereditaments corporeal. It is generally, though not necessarily, a money payment.[d]

263. The remedy by distress (which was not incident[3] to rents seck, *i.e.*, rents reserved to one who had no seignory or reversion, but which was generally added by express contract) is now implied in all cases by statute.[e] Yet in a rent charge an express power to distrain is still generally added.

264. A memorial of a rent charge, unless granted by will or marriage settlement, requires to be enrolled in the Court of Common Pleas.[f][4]

265. A rent charge is a grant by A to B of an annual sum of money payable out of certain lands in which the grantor A has an

[a] 17 & 18 Vic. c. 90.
[b] 18 & 19 Vic. c. 15, § 12, 14.
[c] 2 Jarm. & Byth. by Sweet, 5, 13.
[d] Co. Litt. 142 *a*; *Doe* v. *Benham*, 7 Q. B. 982.
[e] 4 Geo. II. c. 28, § 5; *Battery* v. *Robinson*, 3 Bing. 392.
[f] 17 & 18 Vic. c. 90; 18 & 19 Vic. c. 15, § 12, 14. *Ante*, § 260.

IN SCOTLAND.

[1] The deed does not require to be registered, but it may be registered in the General Register, for preservation; and also, in order that summary diligence or execution may pass upon it, without the necessity of an action. See *post*, § 368*n*.

[2] *Contra.* It goes to the heir as being a right, having *tractum futuri temporis*, and is heritable and not moveable property. M. 15,915; Bell's Pr. § 1480.

[3] *Contra;* the remedy of poinding the ground, which, however, is partly an action, is incident to the creditor in a ground-annual. Bell's Pr. § 887.

[4] Infeftment on a deed creating a ground-annual must be recorded like that on other deeds affecting land; or the deed itself must be recorded in the Register of Sasines. See *post*, § 359*n*, 368*n*.

estate.[1] A cannot grant a rent which will continue longer than his own estate; but if he is owner in fee-simple, he may grant it to B for a term of years, or for life, or in tail, or in fee-simple.

266. *Estate in fee-simple in a rent charge.*—A grant of a rent charge by A to B and his heirs, *i. e.*, where B takes an estate in fee-simple in the rent charge, is not uncommon[2] in Manchester and Liverpool, and is a mode by which the purchaser of lands, instead of paying a gross sum as purchase-money, pays it as a yearly rent or perpetual rent charge. The conveyance is from A to B and his heirs, to the use that A may thereout receive the rent, and to the further use, that if such rent is not paid when due, A may distrain, and to the further use, that, in case of non-payment, A may re-enter and hold till the arrears are paid; and subject thereto to the use of B and his heirs and assigns for ever. This kind of deed, as well as rent charges in general, are, however, considered as contrary to the policy of the common law.[a] And if any part of the land be released by A, either expressly by deed, or impliedly by his purchasing part of the land (but not by his taking it by descent), the whole rent is extinguished.[b] Yet A may release part of the rent charge without affecting the rest.[c] And if the grantee of a rent charge conveys part of it to a stranger, an apportionment will take place.[d]

[a] Co. Litt. 147 *b*.
[b] Litt. § 222, 224; *Dennett* v. *Pass*, 1 Bing. N. C. 388.
[c] Co. Litt. 148 *a*; Burton's Comp. § 1123.
[d] 3 Cruise, Tit. 28, c. 3, § 20, 21.

IN SCOTLAND.

[1] An infeftment of annual rent, which came to be superseded by heritable bond, was the same kind of security, though now in disuse; but the converse is common, viz., where A dispones to B, reserving a ground-annual. This is the usual arrangement in building feus. See next note.

[2] The same. This is a common form of conveyance in Glasgow and in large towns, called a *contract of ground-annual.* A dispones to B, subject to the feu-duty, and to an annual payment to A and his heirs, which is declared to form a real burden on the lands, which A is to have right to recover by poinding of the ground (*i. e.*, distress). The right to the ground-annual is transferred by assignation only. The payment of the ground-annual is often further secured by B granting to A a bond for the value of the burden. On B selling the lands, he is still liable on this bond; and also, where he bound himself personally in the contract of ground-annual. *Miller* v. *Small*, 25 Sc. Jur. 334; 1 Macq. 345; *Gardyne* v. *Royal Bank*, 25 Sc. Jur. 399; 1 Macq. 358; *Elmsley* v. *Brown*, 27 Sc. Jur. 346; 2 Macq. 40. The ground-annualer (*i. e.*, owner of the rent-charge) can poind the ground (*i. e.*, distrain) for his debt. See also 3 Ross, L. C., 69.

267. If a rent charge is granted to a man and his heirs, and he dies without leaving any heirs, the rent sinks into the land, and does not escheat, *i. e.*, the land is entirely discharged.[a] [1]

268. *Charge.*—A charge on real or personal estate is a sum of money payable out of the same.

269. *Charge of debts on real estate.*—Where a testator expressly devises his estate to pay his debts, or even indicates in his will that his debts should be paid, without specifying that these are to be paid out of his real estate, the effect of this is to charge the lands, so that the creditors can follow it; and thus they have more than a mere personal remedy against the executor.[2] If the owner of real estate die without so charging the same, though it is liable to pay his debts; yet the creditors have no charge on the land.[b] A charge or lien on all the debtor's lands in England is also created by the mere registration of a judgment or decree of any of the superior Courts of law or equity.[c] [3]

270. The effect of a testator charging his debts on his real estate, is to make such real estate equitable assets, so that all the creditors, whether simple contract, or specialty, or other creditors, share equally,[4] contrary to the rules of priority observed at common law.[d]

271. So a testator may charge the legacies upon his real estate; but in that case the real estate will not be liable until the personal estate is exhausted, unless there was an intention to exonerate the personal estate.[e]

[a] Co. Litt. 298, *a*.
[b] Story's Eq. Jur. § 1245 *et seq.*; 2 Spence Eq. Jur. 320.
[c] 1 & 2 Vic. c. 110, § 19; 2 & 3 Vic. c. 11; 3 & 4 Vic. c. 82; 18 & 19 Vic. c. 15.
[d] 11 Jarm & Byth. by Sweet, 435.
[e] 2 Spence, Eq. Jur. 338.

IN SCOTLAND.

[1] *Contra;* the Crown, as *ultimus hæres*, would be entitled to the ground-annual.

[2] This would not create a real security over the land, so as to enable creditors to follow the land, unless a trust was created by the *mortis causa* disposition.

[3] *Contra;* specific lands of the debtor, against whom a decree is obtained, may be charged by adjudication; but the mere decree against the debtor does not affect any property, heritable or moveable, which he might possess.

[4] This is the result at common law, there being no priority between creditors, according to the instrument by which the debt is secured. See *post*, "Succession."

272. The mode of giving effect to a charge is by application to the Court of Chancery to sell the estate and distribute the proceeds equally.[a] And where the charge is of a gross sum, and not of a rent or yearly sum, it does not imply a power to distrain for the amount.[1]

273. *Liens on land.*—A lien is a hold upon property for the satisfaction of some claim attaching thereto. Thus a vendor has, in the absence of express agreement, a lien upon the real estate sold for the unpaid purchase money.[b] [2] So a trustee has a lien on the trust estate for his expenses.[c] A solicitor has, however, no lien upon real estate which he has recovered by action or suit in respect of the expenses or costs he has incurred for his client.[d]

274. A lien is enforced by application to a court of equity to sell the property to which the lien is attached.[e]

275. *Tithes and advowsons.*—Tithes and advowsons[3] are incorporeal hereditaments, which will be afterwards noticed.[f]

276. *Franchises.*—A franchise or liberty is a royal privilege or branch of the Crown's prerogative, subsisting in the hands of the subject;[g] as the franchise to a lord of the manor to enjoy wreck,

[a] 2 Spence, Eq. Jur. 365.
[b] Sugden, V. & P. 552.
[c] 2 Spence, Eq. Jur. 803.
[d] *Shaw* v. *Neale*, 6 H. L. Cas. 581.
[e] Story's Eq. Jur. § 1217.
[f] See *post*, Part V. "Church."
[g] Finch, L. 164.

IN SCOTLAND.

[1] A *reserved burden* is a common form of creating a real security. Thus if A sells land to B, and the price is unpaid, A may in his disposition declare the sum a real burden on the land. Such a burden may be created in favour either of A himself or a third party. The burden must be expressly declared in the dispositive clause. It must be specific in amount, and in the name of the creditor. It is a common practice, however, to take also a collateral security, as a bond from the disponee, for the same sum. The creditor may transfer his right to the debt by assignation, intimated to the holder of the burdened infeftment. The creditor cannot enter into possession, or raise an action of maills and duties (*i.e.*, sue for the rents). But he can poind the ground (*i. e.*, distrain). He can adjudge the land (*i. e.*, take it under an *elegit*). He can follow the land in the hands of a purchaser. Bell's Com. by Shaw, 918. 3 Ross, L. C. 1.

[2] *Contra;* there is no lien or hypothec over the land, but the vendor may, in his conveyance or disposition, expressly reserve the sum unpaid as a real burden on the land. See *ante*, § 272, and *post*, § 327.

[3] As to teinds and patronage, see *post*, Part V. "Church."

estrays, waifs, or treasure-trove, to have a fair or market, or ferry.[a] [1]

277. *Offices.*—An office, *i. e.*, the right to exercise a public or private employment, is a species of incorporeal hereditaments.[b] They are generally granted for life or during good behaviour; but in some cases are granted to a man and his heirs.[c] [2]

278. *Commons.*—Common [3] is a right or privilege to take or use some portion of another's lands or produce, and the chief commons are common of pasture, common of piscary, common of turbary, and common of estovers.[d]

279. Common of pasture [4] is subdivided into common appendant, *i. e.*, a right to feed beasts on the wastes of the common, and which right is annexed to land within a manor; common appurtenant, which must be claimed by grant or prescription, and may be annexed to lands in different manors; common because of vicinage, *i. e.*, where inhabitants of adjoining manors or townships allow their cattle to stray into each other's fields;[e] common in gross, which has no relation to land, but is annexed to the person.

280. Common of estovers is the right to cut another's woods and hedges for necessary use and repairs.

[a] 2 Bl. Com. 37. See *ante*, § 1-11.

[b] 2 Bl. Com. 36.

[c] As to how far creditors can make these available, see *post*, "Bankruptcy," "Insolvency."

[d] 2 Bl. Com. 33.

[e] *Pritchard* v. *Powell*, 10 Q. B. 589; *Jones* v. *Robin*, *Ib.* 581, 620.

IN SCOTLAND.

[1] These are included under the head of things held in trust for the public, and are the subjects of royal grants or charters. See *ante*, § 1-12.

[2] The same; Ersk. 2, 12, 7; *Off. of State* v. *Dunglas*, 1 Bell's Ap. 519.

[3] Commonty is a right which is considered as a limited property, and something larger than a mere servitude. The word *servitude* is of wide signification (including commons and easements, and even life estates). Servitudes are known as positive and negative. Positive servitudes, as passage (right of way), aqueduct, watering of cattle, etc., can be constituted only by grant or prescription. Negative servitudes, as light, prospect, etc., can be constituted only by grant. Servitudes are also classed as real or praedial and personal. Praedial servitudes are subdivided into rural and urban, from their being found more or less in country or town. All rural servitudes are positive, while urban servitudes are chiefly negative, but some are positive. Ersk. 2, 9, 1; Bell's Pr. § 979, *et seq.*

[4] This is called the servitude of pasturage, and an action of sowming and rowming is the process by which the respective rights of the commoners are adjusted.

281. Common of turbary[1] is the right to dig turf in another's land.

282. Common of piscary[2] is the right to fish in the private waters or streams of another person.

283. The owner of the soil, or lord of the manor, if the soil is part of a manor, has the freehold or inheritance in him,[3] and may exercise every act of ownership not destructive of the commoner's right.[a] And by the statute of Merton (20 Hen. III. c. 4) and subsequent statutes, the owner can inclose as much of the waste as he pleases for tillage and wood ground, provided he leaves common sufficient for the commoners.[b]

284. Wastes may be inclosed by agreement between the lord and all the commoners; or by private or local Act of Parliament; or by proceedings under the General Inclosure Acts.[c 4]

286. *Easements.*—An easement is a privilege without profit which one owner has in the property of another. The chief easements are right of way, right of watercourse, right of light and air, right of support.

287. *Ways.*—A right of way[5] is a right of going over another man's ground. The right arises either by express grant, or by pre-

[a] 3 Cruise, T. 23, § 2, 47.

[b] 2 Bl. Com. 34; *Patrick* v. *Stubbs*, 9 M. & W. 830.

[c] The General Inclosure Acts are numerous, 41 Geo. III. c. 109, 3 & 4 Vic. c. 31, 8 & 9 Vic. c. 118, 12 & 13 Vic. c. 83, 15 & 16 Vic. c. 79, 17 & 18 Vic. c. 97.

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[1] This is called the servitude of fuel, feal, and divot.

[2] This is called the right of fishing, and is not a servitude, but a pertinent of property; or it may be held as a feudal subject separate from the lands. See *ante*, § 6.

[3] So the ownership is in the paramount proprietor, from whom the right was originally derived. Bell's Com. by Shaw, 800.

[4] So a statute was passed authorising a compulsory division; but commons of royal burghs and the Crown are excepted. 1695, c. 38; M. 2472. The process is called a division of commonty, and is raised in the Court of Session. The holder of the *dominium utile* gets, in such division, the share of commonty corresponding to the land in his possession, according to the valued rent. *L. Blantyre* v. *Jaffray*, 19 D. B. M. 167.

[5] Called the servitude of passage, which is distinguished into *iter* (footway and bridle-way), *actus* (drift-way for cattle), and *via* (way for carriages, etc.) Ersk. 2, 9, 12; *Harvey* v. *Rodgers*, 3 W. S. 251; *Macgregor* v. *M. Breadalbane*, 7 Bell's Ap. 43. As to how far the terminus of the way must be a public place, see *Cuthbertson* v. *Young*, 26 Sc. Jur. 310; 1 Macq. 455. *Campbell* v. *Lang*, 25 Sc. Jur. 393; 1 Macq. 452.

scription, or by necessary implication. The right of driving carts does not of necessity imply[1] the right of driving cattle, though the latter is a right of a subordinate class.[a] Though the servient owner is not bound at common law to repair, he may be bound by prescription or tenure to do so.[b] The dominant owner, being bound at common law to repair, has no right to go out of the way where it is founderous; but he is entitled to enter on the land to do repairs.[c] The servient owner is not entitled to alter the course[3] of a road (though it may be equally convenient to the dominant owner) without the consent of such dominant owner.[d]

A right of way, which is private, *i.e.*, confined to a few individuals, is called an easement; but every way, whether a foot-way, bridle-way, drift-way, or carriage-way, which is common to the public, is called a highway. When a private right of way is obstructed, an action at law is the proper remedy; but when a highway is obstructed, an indictment is, in general, the proper remedy.[4]

288. *Watercourse.*—The right which the owner of land adjoining has in running water, is partly an easement, and partly a right of property.[5][e] The owner of land, through which water runs or percolates subterraneously, and not in a defined channel, into a river, has a right to dig or excavate such land, though the effect is to intercept the flow, and thereby lessen the water of the river.[f]

[a] *Dyson* v. *Ballard*, 1 Taunt. 279; *Cowling* v. *Higginson*, 4 M. & W. 250; *Higham* v. *Rabbit*, 5 Bing. N. C. 622.
[b] 2 Inst. 700; Com. Dig. Chemin. A. 4.
[c] *Taylor* v. *Whitehead*, 2 Doug. 745; *Bullard* v. *Harrison*, 4 M. & Sel. 387.
[d] Com. Dig. Chemin. D (5), Noy 128.
[e] *Miner* v. *Gilmour*, 12 Moore P. C. 131.
[f] *Acton* v. *Blundell*, 12 M. & W. 324; *Dickinson* v. *Grand Junction Canal*, 7 Exch. 282; *Chasemore* v. *Richards*, 7 H. L. Cas. 349.

IN SCOTLAND.

[1] *Contra*; it is included. *Swan*, 12 S. D. 316; Stair, 2, 7, 10.

[2] The same. *Weir* v. *Glenny*, 7 W. S. 244. As to the distinction between a public and servitude road, see *Thomson* v. *Murdoch*, 24 D. B. M. 975.

[3] *Contra*; the servient owner may substitute one road for another, if equally convenient. M. 14,525; 14,531; *Beveridge* v. *Marshall*, 18th Nov. 1808, F. C.; *Mag. of Renfrew* v. *Spiers*, 2 S. D. 410.

[4] *Contra*; in both cases an action of declarator is the usual remedy. In the latter case indictment is not the remedy, but the action may be raised by one or more persons, who are not locally connected with the district. *D. Atholl* v. *Torry*, 24 Sc. Jur. 86; 1 Macq. 65; *Campbell* v. *Lang*, 25 Sc. Jur. 393; 1 Macq. 452; *Napier* v. *Morrison*, 12 D. B. M. 1404; *Dyce* v. *Hay*, 24 Sc. Jur. 465; 1 Macq. 305. And the judgment is *res judicata*; *Jenkins* v. *Robertson*, 36 Sc. Jur. 582.

[5] It is called a common interest; Bell's Pr. § 1100.

289. *Easement, how created.*—An easement, not arising by necessary implication, may be created by express agreement, and the agreement must be by deed under seal.[a][1] A license, which is a revocable thing, may work the extinguishment of an easement, but cannot create an easement.[b]

290. *Grinding corn at a mill.*—The obligation to grind corn at the mill of the lord of a manor is a custom sometimes[2] found in manors, in which case the custom is the measure of the right; and a covenant to do suit to a particular mill is occasionally inserted in a lease.

291. *Powers.*—A power[3][c] is often given by a deed or settlement to a person to do something connected with real estate, as to sell, mortgage, charge, or exchange the estate.

292. In creating a power, it is usual to specify by what writing the power is to be executed, as by a writing under the hand, or under the hand and seal, of the donee of the power, or a writing attested by one witness, or by two, etc.[4] In such a case the formalities required

[a] Co. Litt. 9*a*; Burt. Comp. § 1167.
[b] Gale on Easements, 20 *et seq.*
[c] The stat. 22 & 23 Vic. c. 35, § 12-18, now amends the law as to Powers.

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[1] *Contra;* it may be by any written agreement, as well as by deed. Ersk. 2, 9, 3; M. 8403, 14,499; *Sievright*, 7 S. D. 210.

[2] *Contra.* This is an important right, though not a servitude, and is very common, under the name of thirlage. Certain lands are said to be astricted to a particular mill for the grinding of corn. The territory is called the thirl, and multures are the proportions of corn paid to the miller for grinding the rest. These multures are insucken or outsucken, the latter being a composition paid for escaping the obligation. The obligation may extend not only to growing corn—*i.e.*, the corn raised on the lands, but—to corn *invecta et illata*—*i.e.*, all corn, wherever grown, brought within the thirl. Thirlage is established by grant, express or implied, or by prescriptive possession founded on a written title. See Bell's Com. by Shaw, 860; *Dawson* v. *Mag. of Glasgow*, 2 W. S. 230; 4 W. S. 81; *Harris* v. *Mag. of Dundee*, 35 Sc. Jur. 487.

[3] A faculty to burden an estate may be reserved by a deed, and the faculty-holder may exercise it in like manner.

[4] The faculty seldom specifies the formalities of the deed or writing; and hence the deed must be executed in the ordinary way, and the Court will not interfere to aid a defective execution of a deed. See Bell's Com. by Shaw, 923. Bell's Pr. § 924; 2 Bell's Ill. 111; *Hyslop* v. *Maxwell*, 12 S. D. 413. A faculty cannot be delegated. *D. Northumberland* v. *MacGregor*, 5 Bell's Ap. 396. If partly bad, it is entirely bad. *Baikie* v. *Simpson*, 34 Sc. Jur. 338; *Watson*, 17 Feb. 1837.

must be strictly complied with.[a] But considering the hardships caused by this strictness, a court of equity will often aid the defective execution of the power, where the intended appointee is a purchaser, or a creditor, or a wife, or a child, or a charitable institution.[b] Where the power is to be executed by will, it is sufficient if the will is executed in the ordinary way required by statute.[c] And a general devise of real estate will include any real estate over which the testator had only a power of appointment, unless a contrary intention appear by the will.[d] Where a power to lease was given, and the power had been exceeded, the lease could formerly be set aside by the remainderman; but now, if the lease was made *bona fide*, and the lessee has entered, the lease will be held valid so far as to comply with the power; or the remainderman may, by consent, confirm the lease without variation.[e] A married woman, who is the donee of a power, may execute it without the consent of her husband.[f]

293. The party setting up the execution of a power, must prove affirmatively that the power was duly executed.[1]

294. *Illusory appointment of power.*—Where a power is given by a deed or will to appoint real or personal property among several objects, so that none of the objects can be excluded from a share, no appointment can now be impeached on the ground that the share is unsubstantial, illusory, or nominal.[g][2]

[a] 1 Sugd. Powers, 280 *et seq*; *Vincent* v. *Bp. of Sodor*, 5 Exch. 683; *Burdett* v. *Spilsbury*, 10 Cl. & F. 340.

[b] 2 Sugd. Powers, 93; 2 Chance, Powers, 488.

[c] 1 Vic. c. 26, § 10.

[d] 1 Vic. c. 26, § 27.

[e] 12 & 13 Vic. c. 26; 13 & 14 Vic. c. 17.

[f] 1 Sugd. Pow. 181, 182; *Doe* v. *Eyre*, 3 C. B. 537; 5 C. B. 713.

[g] 1 W. IV., c. 46.

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[1] *Contra;* it lies on the opposite party to show that the faculty was not duly exercised. *Cunninghame* v. *M'Leod*, 5 Bell's Ap. 252; *Cameron* v. *Mackie*, 7 W. S. 106; *Dickson* v. *Dickson*, 26 Sc. Jur. 529; 1 Macq. Ap. 729.

[2] This point is not quite settled, and there is no statute on the subject. *Craucour* v. *Graham*, 6 D. B. M. 589. *Marder* v. *Marder*, 25 Sc. Jur. 374.

CHAPTER XII.

PRESCRIPTION AND LIMITATION.

295. A title to corporeal hereditaments may be acquired under the Statute of Limitations, by a party being in possession for a certain length of time, at the end of which the right of action of the person really entitled is cut off by the Statute of Limitations, and the estate is given to the possessor. A title may also be acquired to incorporeal hereditaments, such as rights of common, easements, tithes, advowsons, by prescription, *i. e.*, the uninterrupted enjoyment of these for certain periods.[1]

STATUTE OF LIMITATIONS.

296. *No action to recover land after twenty years.*—Since 1833, no person can recover any land or rent but within twenty years next after the time at which the right to bring an action first accrued to him, or to the person through whom he claims.[a] Land, in this sense, includes all corporeal hereditaments, and any share, estate, or interest therein, whether a freehold or chattel interest, and whether of freehold or copyhold tenure.[b] The possession of land for twenty years, though without any title, subject to certain qualifications afterwards mentioned, vests the legal fee-simple at the end of such time in the possessor, the right of the party entitled to recover being at the same time extinguished.[c] [2]

[a] 3 & 4 W. IV. c. 27, § 2. [b] *Ibid*, § 1.
[c] 3 & 4 W. IV. c. 27, § 34; *Incorp. Soc.* v. *Richards*, 1 Dr. & W. 289; *Scott* v. *Nixon*, 3 Dr. & W. 388; Sugd. Real P. Stat. 11.

IN SCOTLAND.

[1] The word prescription is applied both to acquiring and losing property, (and thus includes prescription and limitation in E). See *post*.

[2] *Contra*; the period is forty years. But mere possession of heritable property for that period does not raise the presumption of property. The

Prescription and Limitation.

Bona fide possession of land on defective title.—Where a party has been in possession of real estate under a title, which he *bona fide* believed to be good, but which is found not to be so, the person really entitled can recover, not only the estate, but the *mesne* profits which have been received and consumed by such party in possession, except so far as he is barred by the Statute of Limitations.[1]

297. *Limitation of action as against the Crown.*—The Crown is

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party in possession must also produce certain written deeds as a title, and then his title is good by the *positive prescription.* The stat. 1617, c. 12, defines such title to be a charter of the lands granted to the claimant or his predecessors prior to the forty years, and an instrument of sasine thereon, or if there is no charter, then there must be instruments of sasine, one or more standing together for the said space of forty years, either proceeding upon retours or upon precepts of *clare constat.* See Bell's Pr. § 2008. At the same time, all actions upon heritable bonds, reversions, contracts, and others whatsoever are, after forty years, cut off by what is generally called the negative prescription. 1617, c. 12. Hence if A has possessed for a hundred years, but was not infeft, any competitor who has neglected his right for that time may completely establish it, if his right is better than A's. Per L. Corehouse in *Cubbison* v. *Hyslop*, 16 S. D. 112. See Napier on Prescription. Lord St. Leonards has said that much confusion has been caused in the law by the introduction of the terms positive and negative prescription. *Dougall* v. *Dundee Harbour Trustees*, 24 Sc. Jur. 385; 1 Macq. Ap. 317.

Thus the only way of acquiring property absolutely by lapse of time is through the positive prescription, which applies to all feudal subjects vested by infeftment, and also to subjects which may be transmitted without sasine, as leases and servitudes. Bell's Pr. § 2014. A feudal right of property cannot be lost by the negative prescription. *Presb. Perth* v. *Mag. Perth*, 3 Ross, L. C. 316. But in general, all rights of action or obligations, heritable or moveable, mutual or unilateral, which the creditor has neglected to exercise or prosecute for forty years, are cut off by the long negative prescription, which proceeds on the presumption of abandonment after that period. Stats. 1469, c. 28; 1474, c. 54; and 1617, c. 12.

[1] *Contra;* The party in possession, who has *bona fide* consumed the rents and profits during his possession, is not liable to refund them, and he is considered to be a *bona fide* possessor, in general, until the execution of citation in an action by the person really entitled, and in doubtful cases even up to the date of final decree of the House of Lords. Ersk. 2. 1, 28; *Innes* v. *D. Gordon*, 4 W. S. 305; *Mag. of Dingwall* v. *Munro*, M'L. & Rob. 772; *Carnegie* v. *Scott*, 4 W. S. 431; *Agnew's Ex.* v. *Stair*, 3 W. S. 286.

not bound by the above statute, but under the Nullum Tempus Act and other statutes, the right of the Crown to land is in general lost after the lapse of sixty years of adverse possession.[a 1]

298. *From what time the twenty years counted.*—The time at which the right to sue for the recovery of land first accrued is counted as follows.[b] If the party claiming shall have been formerly in possession or receipt of the rents and profits, the right of action first accrued at the time of the dispossession, or at the last time at which the rents or profits were received. If the last owner was in possession and in receipt of the rents till his death, then the right of action accrued at such death. If the claimant claim under some deed or instrument, other than a will, executed by the last owner in possession, and no person shall have been in possession under such deed or instrument, then the right of action accrued at the time the claimant became entitled under the deed or instrument. If the claimant claims in respect of an estate or interest in reversion or remainder or other future estate, and no one has, in virtue of such estate, been in possession or receipt of rents, then the right of action accrued at the time at which such estate or interest became an estate or interest in possession.[2] If the claimant claims by reason of some forfeiture or breach of condition, his right of action accrued when the forfeiture was incurred, or the condition was broken; but if he did not take advantage of the forfeiture or breach of condition, then his right of action will be taken to have accrued when his estate in remainder became an estate in possession.

299. *Tenants being in possession.*—If a tenant at will is in possession, the right of action of the claimant entitled, subject to such tenancy, accrued either at the determination of the tenancy, or one

[a] 9 Geo. III. c. 16; see also 21 Jas. I. c. 14; *Tuthill* v. *Rogers*, 1 J. & Lat. 36.
[b] 3 & 4 W. IV. c. 27, § 3.

IN SCOTLAND.

[1] The positive prescription runs against the Crown. Stat. 1617; *L. Adv.* v. *Graham*, 7 D. B. M. 183. But it has not been settled, whether the negative prescription does so. Napier on Prescr. 650; *E. Fife* v. *Woods and Forests*, 11 D. B. M. 889.

[2] So, while a liferenter is in possession, prescription does not run against the fiar, if the liferent flowed from such fiar. More's Stair, notes 267; M. 11,193; M. 11,207-8; Napier, Prescr. 535, 554, 941.

year from its commencement.[a] So as to a tenant from year to year or other period, the right accrues at the end of the first of such years or periods.[b] [1]

300. *Acknowledgment of title taking case out of the statute.*—Where B, the person in possession or receipt of the rents or profits, shall have given an acknowledgment of the title of A in writing, signed by himself, to A the person entitled to the land or rent, then such acknowledgment by B shall be deemed the possession or receipt of A [2] at the time it is given, from which, or the last of which dates, and not before, the statute shall begin to run.[c]

301. *Savings in case of disabilities.*—If the party entitled to bring the action, at the time it accrues, is an infant, a feme covert, an idiot, lunatic, unsound in mind, or absent beyond seas, then he or she, or the person claiming through him or her, may, notwithstanding twenty years have elapsed, bring the action within ten years after the determination of the disability, or the death, whichever shall first happen.[d] [3]

[a] 3 & 4 W. IV. c. 27, § 7.
[b] *Ibid*, § 8.
[c] *Ibid*, § 14.
[d] *Ibid*, § 16.

IN SCOTLAND.

[1] *Contra;* before a tenant could prescribe a title to the property, he must cease to possess as tenant, as by obtaining himself invested in the lands *a non domino*, after which possession for forty years, without paying rent, will suffice. Napier on Prescrip. 184. So as to a vassal prescribing a title to the superiority. Napier, 186. A tenant who continues to possess, but without paying rent, for forty years, could prescribe to the lease, but not to the property. Maule, 7 S. D. 527; Stair 2, 12, 23.

[2] *Contra;* such an acknowledgment would not have a similar effect, so as to interrupt the positive prescription, unless the possession itself were interrupted. See Bell's Pr. § 2007; Napier on Prescr. 702.

[3] Minors are expressly excepted from the operation of the positive prescription by the stat. 1617, c. 12, and they are excepted also from the negative prescription. Other exceptions are often pleaded at common law on the maxim *contra non valentem agere non currit præscriptio.* Thus, *non valentia* or *non valens agere* is the term, under which are included absence beyond seas, furiosity, etc. Married women are excepted from prescription in suing for implement of a marriage-contract, M. 10,717; 11,205. As to idiots and lunatics, it seems not decided. Bell's Pr. § 161; Napier on Prescr. 529. Absence beyond the seas is no disability. Napier, Prescr. 534; *Graham* v. *Watt*, 5 Bell's Ap. 172. And generally, the plea of *non valens agere* is not a competent answer to the positive prescription. *M'Neal* v. *M'Neal*, 20 D. B. M. 735.

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302. But no action shall be brought beyond forty years from the time at which the right of action first accrued, though the person under disability at the time the action accrued continues under such disability, or under successive disabilities lasting for the whole forty years, or though the term of ten years after the disability has ceased has expired.[a] [1]

303. And if the person shall be under a disability when the action first accrues, and shall die under the disability, no further time beyond the twenty years from the right accruing, or ten years after the death, shall be allowed by reason of the disability of any other person.[b] [2]

304. But absence in any part of the United Kingdom, or the islands adjacent, is not deemed absence beyond seas[3] within the meaning of this statute.[c]

The disability, which saves the statute of limitations, must have existed at the time the right of action first accrued: for, when such right has once accrued, no supervening disability can prevent the statute from running, or extend the period further.[4]

305. *Fraud.*—In case of a concealed fraud, the right to bring a suit in equity to recover land thereby obtained, is deemed to have accrued at and not before the time, when, with reasonable diligence,

[a] 3 & 4 W. IV. c. 27, § 17. [b] *Ibid*, § 18.
[c] *Ibid*, § 28.

IN SCOTLAND.

[1] *Contra;* there is no defined limit to the period in the case of successive disabilities. See next note.

[2] *Contra.* The question of a succession of minorities has frequently arisen under deeds of entail, in reference to the words of the statute 1617, c. 12. The exception of minority in such cases is held to extend no further than to the person who is in the actual right (Bell's Pr. § 2022; Napier on Prescr. 486), but it extends to any number of minors in succession, provided each has such right.

[3] *Contra;* absence beyond seas is no exception to the positive prescription, any more than absence in England or Ireland. *Graham* v *Watt*, 5 Bell's Ap. 172.

[4] *Contra;* it is immaterial at what stage the exception of minority or of successive minorities occurs. In all cases the time during which the minority lasts must be deducted from the period of forty years, provided such minor had the actual right at the time to the land.

the fraud might have been discovered.[1] But this shall not affect *bona fide* purchasers for valuable consideration.[a]

306. *Charges and legacies.*—No action or suit can be brought to recover any sum of money secured by mortgage, judgment, or lien, or otherwise charged upon or payable out of land or rent, or any legacy except within twenty[2] years after a present right to receive the same accrued, unless in the meantime some part of the principal or interest has been paid, or some acknowledgment of the right in writing, signed, shall have been given to the party entitled, or his agent, in which case the twenty years are counted from the date of the last payment or acknowledgment.[b]

307. *Suits in equity.*—No suit in equity can be brought to recover land, but within the period during which the person claiming, if entitled at law to the estate, might have brought the action.[c] But where land was vested in trustees, on an express trust, the right of the *cestui que trust* to bring a suit against the trustees, or any person claiming under them, shall be taken to have accrued at, and not before the time at which the land shall have been conveyed to a purchaser for valuable consideration, and shall be taken to have accrued only as against such purchaser and those claiming through him.[d][3]

308. *Bringing action to save Statute of Limitations.*—An action is commenced at the date of issuing the summons,[4] and hence the period of limitation or prescription must be computed prior to that date.

[a] 3 & 4 W. IV. c. 27, § 26.
[b] *Ibid*, § 27.
[c] *Ibid*, § 24.
[d] *Ibid*, § 25.

IN SCOTLAND.

[1] The positive prescription requires to be founded on a title; if a deed is forged, the right to raise an action of reduction on that ground is competent at any time; 1617, c. 12. And it seems, though the negative prescription does not run in case of an action to set aside a forged deed, yet it will cut off actions of reduction of deeds on the ground of fraud; Ersk. 3, 7, 12; see *Cubbison* v. *Hyslop*, per L. Corehouse, 16 S. D. 112; *Paterson* v. *Beaconbridge*, 31 Sc. Jur. 176.

[2] The period is forty years.

[3] See *ante*, § 305*n*.

[4] As to the positive prescription, the date of judicial interruption is from the date of citation, which, however, need not be personal. If the action goes no further, the citation requires to be renewed every seven years. If after citation the summons is called, the interruption endures for forty years. Bell's Pr. § 2007. So as to the negative prescription. Bell's Pr. § 617.

The summons need not be served, but if it is not served, it will require to be renewed every six months.[a]

PRESCRIPTION.

309. Prescription is a mode of acquiring incorporeal hereditaments by an uninterrupted enjoyment for a certain length of time, and is now regulated chiefly by statute.[b]

310. The statute expressly applies to the Crown,[1] as well as individual owners. The object of the statute was to shorten in effect the time of prescription, and make that possession a bar or title of itself, which was so before, only by the intervention of a jury.[c]

311. *Rights of common.*—No claim at common law by custom, prescription, or grant, to any right of common or other profit à prendre upon any land, shall, where such right, profit, or benefit shall have been actually enjoyed without interruption for thirty years,[2] be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such

[a] Common L. Proced. Act 1852, § 11. 2 & 3 W. IV. c. 71.

[c] Per Parke B. *Bright* v. *Walker*, 1 C. M. R. 217.

IN SCOTLAND.

[1] As to the Crown, see *ante*, § 297 *n.*

[2] There is only one period, and that is forty years. All rights of way, of aqueduct, of watering cattle, of pasturage, and fuel, feal, and divot, may be lost by the negative prescription, though engrossed in the title of the servient tenement. *Graham* v. *Douglas*, 3 Ross L. C. 448. So they may be acquired by the positive prescription of forty years under the stat. 1617, c. 12. But they may also be acquired, independently of that statute, by immemorial usage or possession, *i.e.*, for forty years. Napier on Prescr. 361; *Rodger* v. *Harvey*, 3 W. S. 251; 3 Ross L. C. 461. Though no title requires to be founded on except the title to the dominant tenement, yet if that title is a bounding title, it seems to exclude the claim. Napier on Prescr. 374, 922; *Mag. of Monance* v. *Mackie*, 7 D. B. M. 582; *Beaumont* v. *Glenlyon*, 5 D. B. M. 1337; *Kerr* v. *Dickson*, 1 Bell's Ap. 499; *York* v. *Ewing*, 20 D. B. M. 351. In claiming a servitude of passage for the public, it is not necessary for the pursuers of the action of declarator to show any title to a dominant tenement, and any person not connected with the locality may sue. *D. Atholl* v. *Torrie*, 24 Sc. Jur. 478; 1 Macq. 65; *Dyce* v. *Hay*, 24 Sc. Jur. 475; 1 Macq. 305. But when the inhabitants of a town set up a right of way for themselves by positive prescription, some *praedium dominans* must in general be alleged. *Town of Dunse* v. *Hay*, M. 1829; *D. Hamilton* v. *Aikman*, 6 W. S. 64.

thirty years; but, nevertheless, such claim may be defeated in any other way by which the same could formerly be defeated, as by a release, by unity of possession, or by severance.[1] And when such right of common or profit à prendre shall have been enjoyed for sixty years, the right shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.[a]

312. *Rights of way, water-course, and other easements.*—No claim to any way, water-course, use of water, or other easement which shall have been actually enjoyed without interruption for twenty years,[2] shall be defeated or destroyed by showing only that such way, etc., was first enjoyed at any time prior to the twenty years; but, nevertheless, the claim may be defeated in any other way, by which the same is now liable to be defeated. And where the way, etc., has been enjoyed for forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given for the purpose by deed or writing.[b]

313. But if the land or water, as to which a right of way, or water-course, or use of water is claimed, has been held by a tenant for life, or tenant for a term of years exceeding three, the time during which such tenancy existed shall be excluded in the computation of the period, provided the claim is resisted by the remainderman within three years after the term has ceased.[c 3]

Dedication of right of way.—Rights of way may also be established by proof of a dedication[4] by the owner in fee to the use of the public, as by leaving his land unfenced and open to the public; in which

[a] 2 & 3 W. IV. c. 71, § 1. [b] *Ibid*, § 2. [c] *Ibid*, § 8.

IN SCOTLAND.

[1] So by renunciation, or discharge, or by confusion (unity of ownership).

[2] The period is forty years. But a servitude of support, being a negative servitude, cannot be proved by prescription, but only by express grant. Ersk. 2, 9, 8; *Young* v. *Cuddie*, 9 S. D. 500; see note, *ante*, § 311.

[3] While a liferenter is entitled to possession, the period would be excluded altogether from the computation of the prescriptive period. Bell's Pr. § 627.

[4] Land may also be dedicated to the use of the public. *Per* L. St. Leonards in *Dyce* v. *Hay*, 24 Sc. Jur. 475; *Galbreath* v. *Armour*, 4 Bell's Ap. 374. See *Cumming* v. *Smollett*, 24 Sc. Jur. 529.

case the inference may be made from user by the public for a few years, *e.g.*, for six years in a town.[a] The way may be dedicated for a limited purpose, as for a horseway or driftway; but it cannot be limited to a part only of the public, as the inhabitants of a parish or village.[b] Yet the inhabitants of a village may, by custom, claim a right of way to church or market.[c]

314. *Lights.*—When the access and use of light to a building shall have been actually enjoyed for twenty years without interruption, the right thereto shall be absolute and indefeasible, unless it appear that the same was enjoyed under some special agreement by deed or writing.[d][1]

315. *Interruption.*—No act or other matter shall be deemed an interruption of prescription, unless the same has been submitted to and acquiesced in for one year[2] after the party interrupted shall have had notice thereof, and of the person making or authorising such interruption.[e]

316. *Presumption from less than twenty years, etc.*—In the cases above mentioned, no presumption shall be made in support of any claim, upon proof of enjoyment of the right for any less periods than the periods respectively applicable to the case, and to the nature of the claim.[f]

317. *Saving for disability.*—The time during which the person otherwise capable of resisting the claim shall have been an infant,[3] idiot, *non compos mentis*, *feme covert*, or tenant for life, or during

[a] *Rugby Charity* v. *Merryweather*, 11 East, 376; *Barraclough* v. *Johnson*, 8 A. & E. 99; *Poole* v. *Huskisson*, 11 M. & W. 827; *Bateman* v. *Bluck*, 18 Q. B. 870.

[b] *Stafford* v. *Coyney*, 7 B. & C. 257; *Poole* v. *Huskisson*, 11 M. & W. 827.

[c] 6 Rep. 60*b*; 2 H. Bl. 393.

[d] 2 & 3 W. IV. c. 71, § 3.

[e] *Ibid*, § 4.

[f] *Ibid*, § 6.

IN SCOTLAND.

[1] *Contra;* the period is forty years. But mere enjoyment of a light without express agreement, gives no right. The servitude of light, being a negative servitude, cannot be established by prescription, and can only be constituted by grant. Bell's Pr. § 994; Ersk. 3, 9, 35; *Morris* v. *Mackean*, 8 S. D. 564. But the grant need not appear in the title of the servient tenement. *Inglis* v. *Boswell*, 6 Bell's Ap. 427; *Ross* v. *Cuthbertson*, 16 D. B. M. 732.

[2] No definite artificial time is fixed as to this.

[3] So the years of minority must be deducted from the positive as well as the negative prescription. *Craufurd* v. *Menzies*, 11 D. B. M. 1127; Bell's Pr. § 625, 627; see *ante*, § 301, § 313*n*.

which an action or suit shall have been pending and diligently prosecuted till abated by the death of any party, shall be excluded in computing the periods before mentioned, except when the right is declared to be absolute and indefeasible.[a]

CHAPTER XIII.

SALE OF LAND.

318. *Agreement to sell land.*—An agreement for the sale of land must be in writing by the Statute of Frauds.[b] [1]

Specific performance.—When a valid agreement to sell land has been entered into, and the vendor refuses to perform his contract, a court of equity will, contrary to the general rule as to remedies for breach of contract, enforce specific performance. The suit for specific performance is directed against the vendor by way of compelling him to execute a conveyance; and now, if, after decree, he contemptuously refuses to convey, the Court may make an order vesting the estate in the vendee.[c] [2]

319. *A good title implied.*—A vendor of real estate is impliedly bound to make a good title.[d] A doubtful title, with an indemnity, cannot be forced on the vendee,[e] [3] yet the vendee cannot object on account of a bare possibility or a suspicion of a defect.[f]

[a] *Ibid*, § 7.
[b] 29 Ch. 2, c. 3, § 1, § 4.
[c] Trustee Act, 1850, § 30.
[d] *Doe* v. *Stanion*, 1 M. & W. 701; Sugd. V. & P. 14.
[e] Sugd. Conc. V. & P. 219.
[f] Sugd. Conc. V. & P. 280, 283.

IN SCOTLAND.

[1] This is so at common law. Ersk. 3, 2, 2. The agreement is generally in the form of "minutes or missives of sale." *Milne* v. *Anderson*, 2 Sh. & M'L. 494.

[2] *Contra.* The form of action in such circumstances, though directed against the vendor, aims also directly at the estate, and is called an action of adjudication in implement. The decree of adjudication is equivalent to a conveyance of the property itself. Ersk. 2, 12, 50; *Hutchison* v. *Wood*, 8 S. D. 982; *Macgregor* v. *Macdonald*, 5 D. B. M. 888.

[3] So a defective title, or one which has never been challenged, coupled with warrandice, cannot be forced upon the vendee. Bell's Pr. § 890; M. 14,176. *Dunlop* v. *Crawfurd*, 12 D. B. M. 518.

320. *Warranty of land sold.*—A vendor does not now by implication warrant [1] the land sold in fee to the vendee, even though the full price may have been paid;[a] the absence of this warranty being supplied by the investigation of the title made by the purchaser. But an express warranty from the vendor's own acts, and the acts of those who have been in possession since the last sale, is generally contained in the deed, in the form of certain usual covenants by the vendor for title.

321. There is now no implied warranty in an exchange, giving, in case of eviction, a right of re-entry on the lands which were given in exchange.[b] [2]

322. The practice of conveying to a purchaser of one estate another estate to be held as an indemnity against eviction, seems very unusual.[3]

323. *Abstract of title.*—The vendor delivers an abstract of his title, going back in general for sixty years at least. Though the Statutes of Limitation recently shortened the period in which a title could be acquired, yet it is still deemed necessary for a purchaser to have a sixty years' title.[c] [4]

324. As there is no general or local register of title-deeds, except in Middlesex and Yorkshire, and each owner keeps his own deeds in his own, or in his solicitor's possession, a time is appointed for the vendee's solicitor to compare the abstract with the originals at

[a] 3 & 4 W. IV. c. 27, § 39; 3 & 4 W. IV. c. 74, § 14.

[b] 8 & 9 Vic. c. 106, § 4.

[c] Sugd. V. & P. 305.

IN SCOTLAND.

[1] *Contra;* absolute warrandice is implied as to all acts prior to sale. Ersk. 2, 3, 27; 3, 3, 9; *Ramsay* v. *Cuninghame,* 8 S. D. 399; *Blair* v. *Mag. of Dunbar,* 14 S. D. 945. This is absolute warrandice as distinguished from warrandice from fact and deed. 10 & 11 Vic. c. 48, § 3.

[2] *Contra;* in an excambion this is implied. *E. Melrose* v. *Kerr,* M. 3677; *Wards* v. *Balconie,* M. 3670.

[3] This is known as express real warrandice; and the lands conveyed are called warrandice lands. Ersk. 2, 3, 28; *Blair* v. *Blair,* Elch. Warr. No. 5.

[4] The progress of titles goes back in general only for forty years, provided there can be shewn, prior to that date, a charter or disposition and sasine. But if the owner was a minor during that period, the progress of deeds will require to be extended.

the office of the vendor's solicitor.[1] But the purchaser must also make a search for incumbrances, which may be created by annuities or rent charges, by registered judgments, by crown debts, bankruptcy and insolvency, etc. The vendor is bound to produce all instruments in his possession or power creating incumbrances, and to inform the vendee of all material facts not apparent on the face of the deeds.[a]

325. The abstract of title gives a short summary of all the deeds, wills, or other instruments, that have been executed with respect to the lands in question during sixty years.[2]

326. *Expense of conveyance.*—The expense of making the searches and comparing the deeds with the abstract, falls on the purchaser. It is the duty of the purchaser's solicitor to prepare the draft of the conveyance, and tender it for approval of the vendor's solicitor, and the purchaser pays the expense of the conveyance, unless there is an agreement to the contrary.[b 3] But the expense of the execution of the conveyance falls on the vendor; and he is bound to procure its execution by all necessary parties.

327. *Vendor's lien.*—Where a vendor delivers possession of the estate to the purchaser, without receiving the purchase money, a court of equity will, whether the estate be or be not conveyed, and though there was no special agreement on the subject, give the vendor a lien on the land for the money; but this lien does not prevail at law.[c 4]

[a] Sugd. V. & P. 5. [b] Sugd. V. & P. 451. [c] Sugd. V. & P. 552.

IN SCOTLAND.

[1] All the principal deeds are on the register, general or local, and a search of the records is always made. Yet there are other matters to be attended to, which cannot be learned from the register, such as litigiosity (*lis pendens*), death-bed, forgery, terce, courtesy, minority, etc.

[2] The vendor's solicitor sends the deeds themselves to the vendee's solicitor, accompanied by an inventory of titles, *i.e.*, a short description of the nature of the deed, and its date, and where registered, but giving no abstract of the contents.

[3] *Contra;* the expense of the conveyance falls on the vendor, if there is no agreement to the contrary, and the vendor's solicitor prepares and tenders the draft conveyance. *Reddie* v. *Higginbotham*, 4 Bell's Ap. 278. But the purchaser pays his own solicitor for perusing and approving the draft conveyance.

[4] *Contra;* there is no lien; but the vendee generally, in these circumstances, reserves the price, if unpaid, in the conveyance, as a burden on the land. *M'Nicol*, 31 Jan. 1816, F. C.; *Mead* v. *Anderson*, 4 W. S. 328. see *ante*, § 272.

328. *Purchase in name of another.*—Where A purchases an estate in land in the name of another person B, the trust of the legal estate results to A, who advances the purchase money, even though B makes no declaration of trust.[a] But there is an exception to the rule, where the purchase is in the name of a child or wife unprovided.[b] [1]

329. *Sub-vendee purchasing.*—When the vendee re-sells the land to a sub-vendee before getting a conveyance, and the sale is under a decree of Court, the name of the sub-vendee is often allowed to be substituted for that of the vendee who is discharged.[c] [2]

330. *Sale by auction.*—Where there is a sale by auction, and no notice is given that the vendor reserves a bidding, he may nevertheless privately employ[3] a puffer to bid once in order to prevent the land from being sold at an undervalue.[d]

CHAPTER XIV.

DEEDS, CONVEYANCES OF LAND, AND REGISTRATION OF TITLE.

DEEDS.

331. A deed is a writing on parchment, vellum, or paper, sealed and delivered, to prove and testify the agreement of the party whose

[a] Sugd. V. & P. 577.
[b] Lewin on Trusts. See *ante*, § 224, 225.
[c] Sugd. V. & P. 78.
[d] Sugd. V. & P. 9.

IN SCOTLAND.

[1] *Contra.* There is no resulting trust, and the fee is in B. Macintosh, 28th Jan. 1812, F. C.; *Spence* v. *Ross*, 5 S. D. 17; 3 W. S. 380. But see M. 11,493; Balvaird, 5th Dec. 1816, F. C.; *Collie* v. *Pirie*, 13 D. B. M. 506, per L. Ivory. See *ante*, § 224.

[2] The vendee may, by 21 & 22 Vic. c. 76, § 13, assign the conveyance, if not recorded, to a third party, and the latter may assign to another, and so on, by a short form; and the last assignee may record the original conveyance in his own name, and the effect is the same as if he had himself been named in it.

[3] *Contra;* where there is an upset price (which is in fact one bidding by the vendor to prevent a sale at an undervalue) and no notice is given that the vendor will bid, he cannot employ a white-bonnet to bid even once; and, if he do so, the purchaser will be relieved *pro tanto* from paying any surplus caused by the puffing. *Faulds* v. *Corbet*, 31 Sc. Jur. 313.

deed it is, to the things therein contained.[a] Deeds are divided, as regards the parties to them, into deeds poll and indentures.[1]

332. *Deed poll.*—A deed poll is not, strictly speaking, an agreement between two persons, but a declaration of some one person respecting an agreement made by him with some other person.[b] Thus a bond is a deed poll.

333. *Indenture.*—An indenture is a deed containing mutual stipulations by two or more persons. Formerly it was usual to write copies of the deed on skins of parchment, indented or cut into acute angles, so as to correspond with each other, and, in some cases, half the word or letters were written on one part, and half on the other; and it has long been the practice to cut the first skin of parchment in an undulating manner. The name seems to have arisen from these being supposed to be guards against forgery, or the fraudulent substitution of one of the skins.[c] But this form is now unnecessary, though still in common use;[2] and no deed, purporting to be an indenture, needs to be actually indented.[d] In indentures, as there are generally as many copies as there are parties, that part executed by the grantor is usually called the original, and the rest are called counterparts; but all make one entire deed, and it is usual for all parties to execute every part, which renders them all originals.[e]

334. Until lately, if a deed was in the form of an indenture, no person could take any immediate benefit under it, unless he was named as one of the parties.[f] But he need not now be a party.

335. *Signature.*—It is not clearly settled, whether a deed requires to be signed by the party; but the better opinion seems to be, that

[a] 4 Cruise T. 32, c. 1, § 16; 2 Bl. Com. 295.
[b] 4 Cruise T. 32, c. 1, § 19; Co. Litt. 229 *a*.
[c] 1 Prest. Shep. T. 50.
[d] 8 & 9 Vic. c. 106, § 5.
[e] 2 Bl. Com. 296; 1 Prest. Shep. T. 51.
[f] 8 & 9 Vic. c. 106, § 5.

IN SCOTLAND.

[1] These terms are not used.

[2] Deeds are generally written on paper, book-wise, of folio or quarto size, though certain documents of title are written on a sheet of parchment. The practice of engrossing deeds bookwise was introduced by statute 1696, c. 15, which superseded the old practice of pasting together rolls of paper or parchment.

even in cases within the Statute of Frauds, signature is not rendered necessary by that statute.[a] [1]

336. *Sealing.*—It is, however, absolutely necessary that the deed should be sealed [2] with a wafer or wax; but if an impression be made with a stick or any thing else, it is said to be equivalent.[b] It is enough that the seal be put to the deed by some one, before the time of actual or constructive delivery.

337. The common practice is for the copying clerk to affix any kind of seal, when he has finished copying it, and for the party to adopt the sealing at the time of execution, by placing his finger on the seal and saying, "I deliver this as my act and deed."[c]

338. *Delivery.*—It is necessary to a deed, that it should be delivered either actually or constructively. The deed may be delivered to the grantee himself, or to another person on his behalf, or it may be delivered verbally and constructively by the party saying, "I deliver this as my act and deed," or words to the like effect, and yet be retained in the custody of the party who made it.[d] [3] The witness attests the fact of the delivery, as well as of the signing and sealing.

339. A deed may be delivered either absolutely as a deed, or

[a] 2 Bl. Com. 305; 1 Prest. Shep. T. 56; 1 Sugd. Pow. 286; *Cooch* v. *Goodman*, 2 Q. B. 580; *Aveline* v. *Whisson*, 4 M. & Gr. 801.

[b] 2 Bl. Com. 305; 1 Prest. Shep. T. 54 *et seq.*

[c] See remarks as to the inutility and inexpediency of retaining this formality, Rep. Merc. L. Com., note by Mr. Anderson.

[d] 4 Cruise T. 32, c. 2, § 75; 3 Jarm. & Byth. by Sweet, 31.

IN SCOTLAND.

[1] A deed is required by statute to be signed. Stats. 1540, c. 117; 1579, c. 80.

[2] *Contra;* no seal is required. After the stat. 1584, c. 4, the practice of sealing fell into disuse. Ersk. 3, 2, 7; Mack. Obs. on Stats. (1540) (1579).

[3] So the deed must be delivered; but delivery is implied, where the delivery is dispensed with by a clause in the deed, as is common in *mortis causa* deeds; Ersk. 3, 2, 44; Bell's Pr. § 24; *Logan* v. *Logan*, 2 S. D. 253; where the deed is a bond providing for a wife or child; *Ibid*, M. 6244; where the deed reserves a liferent to the granter; *Ibid*, *Brack* v. *Hogg*, 5 W. S. 68; and where the deed is in the nature of a mutual contract (*i.e.*, an indenture). The witnesses do not attest the fact of delivery, but merely of the subscription. *Maule* v. *Ramsay*, 4 W. S. 58.

conditionally as an escrow,[1] *i.e.*, as a scroll or writing. When a deed is delivered as an escrow, it ought to be stated to the person receiving it, that it is to be delivered as a deed upon condition, etc., or at some future time named; but if it is in fact delivered on a condition, this will constitute it an escrow.[a 2]

340. *Date of deed.*—The time of delivery of a deed is presumed to be the date mentioned in the deed,[3] unless the contrary appears.[b] The date may be placed either at the beginning or end of the deed;[4] in indentures it is now generally placed at the beginning, and in deeds poll at the end.[c] A deed is good, though it mention no date, or a false or impossible date, provided the true date can be proved; and it takes effect from the time of its delivery.[d]

341. *Witnesses to the deed.*—It seems a deed would not be void, though not attested by any witnesses;[e] but in practice one witness[5] always attests the execution by the party, or by each of several parties, and it is considered advantageous to have two witnesses.

342. The witness's addition and residence are added to his signature, but not mentioned in the attestation clause;[6] such signature

[a] 4 Cruise T. 32, c. 2, § 75, *et seq.*; 3 Jarm. & Byth. by Sweet, 30; *Nash* v. *Flyn*, 1 J. & L. 162.

[b] 4 Cruise T. 32, c. 20, § 4.

[c] 4 Cruise T. 32, c. 20, § 2.

[d] 2 Bl. Com. 304; 4 Cruise T. 32, c. 20, § 4; 1 Prest. Shep. T. 55.

[e] 2 Bl. Com. 307, 378.

IN SCOTLAND.

[1] Deeds may also be delivered on a condition to the depositary; but the term "escrow" is not used. See M. 12,379; *Collie* v. *Pirie*, 13 D. B. M. 506; *Logan* v. *Logan*, 2 S. D. 253; *Falconer* v. *Stephen*, 11 D. B. M. 220, 1338.

[2] The same. M. 11,567; M. 11,570; Stair, 1, 5, 6; 1, 7, 14; Ersk. 3, 8, 2.

[3] It seems the same. And it is not essential to the validity of a deed, that it mention the time of signing. Ersk. 3, 2, 18; *Wemyss*, 1 S. D. 47.

[4] The date is in practice put at the end, and set forth in the testing clause.

[5] *Contra;* two witnesses, at least, are necessary. Stats. 1540, c. 117; 1681, c. 5; M. 17,021.

[6] *Contra.* Each witness adds the word "witness" to his signature, and his name and designation must be stated in the testing clause. Stats. 1579, c. 80; 1681, c. 5. A reasonable particularity in stating witness's occupation or quality and residence in the testing clause, is enough. M. 16,920; M. 16,900; M. 16,913; *Innes* v. *Innes*, Hume, 911; Stats. 1579, c. 80; 1681, c. 5. See as to how far the mis-spelling of the name of a witness is material, *M'Leod* v. *Cunninghame*, 5 Bell's Ap. 210, and cases there referred to.

being put merely by way of memorandum on the back of the deed.[a]

343. The witness must see[1] the party sign, seal, and deliver the deed. But it is not of itself a criminal offence[2] for a witness to endorse his name as such, though he did not see the party sign. The witness's signature on the deed is however not essential[3] to the validity of the deed, being in reality nothing more than a memorandum to assist in afterwards proving the deed. And it is not necessary, though it is usual, for the witness to sign his name.[4]

344. *The attestation clause.*—The attestation clause need not mention the name and addition of the person, who engrossed the deed.[5] Nor need it mention the number of pages, on which the deed is written.[6] Nor need it mention the place or date of execu-

[a] Burt. Comp. § 445.

IN SCOTLAND.

[1] It is enough if the party be known to the witness, and acknowledge the signature to the witness, when the latter subscribes. Stat. 1681, c. 5; M. 16,896; M. 16,887; M. 17,047; *E. Fife* v. *Fife's Trustees*, 2 W. S. 166; 3 Murr. 497.

[2] *Contra;* he is an accessory to forgery unless he knew the party, and either saw him sign the deed, or heard him acknowledge the signature. Stat. 1681, c. 5; *Cleland* v. *Cleland*, 1 D. B. M. 254.

[3] *Contra;* it is necessary for the witness to sign his name; and one witness cannot sign for another. M. 16,906.

[4] *Contra.* Stat. 1681, c. 5; Ersk. 3, 2, 13; Duff's F. C. 16. The witnesses must sign the deed as witnesses; and this is indispensable by stat. 1681, c. 5. Each should add the word "witness" to his signature; and this is the practice, though it is not essential. 4 Br. Sup. 163; *L. Blantyre*, 13 D. B. M. 40. Witnesses, who attest the subscriptions of several parties signing at once, require to sign only once; and it is the practice, though not indispensable, to repeat the signature when any of the parties sign separately. M. 16,901. The witnesses require to sign only the last page, however many may be the pages of which the deed consists. Stat. 1696, c. 15. It is not clear how long the interval may be between signature of a party and of the witness. M. 16,898; M. 16,824; M. 8344; 15 F. C. Apx. 753.

[5] *Contra;* it is essential, that the testing clause should set forth the name, dwelling-place, and other denomination of the person who wrote the deed. Stats. 1593, c. 179; 1681, c. 5; M. 16,916; M. 16,920; M. 17,022; M. 17,026. *Lockhart*, 16th Feb. 1816, F. C.

[6] *Contra;* the testing clause must also state the number of pages of the deed; stat. 1696, c. 15; unless the pages are all on one sheet. M. 16,956; *Edinburgh and Glasgow Bank* v. *Galbreath*, 28 Sc. Jur. 205; 31 *Ibid;* 3 Macq.

tion ;[1] though it generally mentions the date. The attestation clause, though highly important as furnishing evidence of authenticity, is no essential part of the deed.[a 2]

345. *When attestation clause engrossed.*—The attestation clause is completed before execution of the deed,[3] and merely states the date on which the party or parties put their hands and seals to the deed.

346. *Deeds partly written and printed.*—A deed may be engrossed in the handwriting of different persons, and may be printed in whole or in part; and if so, it need not be noticed in the attestation clause, who engrossed the written portions respectively.[4]

347. *Where party cannot write.*—If a party cannot write, either by infirmity or want of instruction, he may either make a mark by way of signature to the deed, or it may be signed for him by a stranger at his request, and in his presence.[b 5]

[a] 4 Cruise T. 32, c. 2, § 81; Burton's Comp. § 450.
[b] 3 Jarm. & Byth. by Sweet, 24.

IN SCOTLAND.

[1] The same, but in practice the testing clause generally states both. *Wemyss* v. *Hay*, 1 W. S. 140.

[2] *Contra*, by statutes stated *supra*.

[3] *Contra*. A blank is always left for the testing clause, because it recites how the deed was executed, etc.; and the testing clause is engrossed afterwards, and sometimes not till the lapse of years. It should, however, be engrossed promptly. Bell's Pr. § 2226; *Dick* v. *Dick*, Hume 908; *Macleod* v. *Cuninghame*, 5 Bell's Ap. 210; *Kedder* v. *Reid*, 1 Rob. Ap. 183. For the sake of giving a connected view of the requirements of the testing clause, it may be stated, that it should mention the number of pages of which the deed consists, where there are more than one page—the name and designation of the clerk or clerks who engrossed the deed—the fact that the deed was subscribed by each of the several parties—the date and place of the subscription of each party—the name and designation of each of the witnesses, two being necessary to the signature of each party, if the parties sign separately—the marginal additions, interlineations, and erasures, if any, and the page and line on which they occur respectively, adding that these were made or written before signature.

[4] A deed may, since 1858, be partly printed or engraved, and partly written, but the written portion must be referred to, and identified in the testing clause in the manner above stated. 21 & 22 Vic. c. 76, § 34; see *ante*, § 344 *n*.

[5] *Contra;* a deed signed by a cross or mark is null. Ersk. 3, 2, 8; Duff, Feud. Conv. 11; *Graham* v. *M'Leod*, 11 D. B. M. 173. Two notaries must execute it before four witnesses. Stat. 1579, c. 80; Act of Sed. 21st

348. *Interlineations, erasures, and alterations.*—A deed should not be altered after delivery; but any alteration by interlineation or erasure, made before delivery of the deed, and by whomsoever made, will not invalidate the deed.[a] But in practice it is usual to take notice in the attestation clause of such alterations, to prevent future questioning.[b] [1] An interlineation, if nothing appears to the contrary, will be presumed to have been made at or before the time when the deed was executed,[2] for to presume otherwise would be to presume fraud and wrong.[c] An alteration in a material part by a mere stranger, without the consent of the party benefited, would not invalidate the deed.[d] But if a party has made a material alteration to his own benefit, the deed will be made void as regards the opposite party, though it may remain valid as against himself.[e]

349. *Paging of deed.*—The deed need not bear on each page the number of such page, as page first, page second, etc.[3]

[a] 1 Prest. Shep. T. 69; 3 Jarm. & Byth. by Sweet, 18.
[b] 4 Cruise T. 32, c. 26, § 15.
[c] *Ibid.* *Doe d. Tatum* v. *Catomore*, 19 Q. B. 745.
[d] 1 Prest. Shep. T. 69.
[e] *Ibid.* 2 Bl. Com. 308; 4 Cruise T. 32, c. 26, § 12; 3 Jarm. & Byth. by Sweet, 18.

IN SCOTLAND.

July 1688. *Galletly* v. *Macfarlane*, 6 D. B. M. 1. The party must touch the notaries' pen in token of authority, Stat. 1681, c. 5, or must acknowledge it before the witnesses. The notaries explain their act in a docket, and their authority is stated in the deed. M. 16,846; M. 16,835; M. 16,838. See *Duff* v. *Fife*, 1 Sh. Ap. 498. If the party is nearly blind, he may either sign with his own hand, or it may be attested by notaries. *Reid* v. *Baxter*, 1 Rob. Ap. 66.

[1] All interlineations, erasures, or additions should be specified and identified in the testing clause, which should describe the page and line on which they occur respectively. The party should also put his signature or initials to the marginal addition, &c., and the testing clause should state who wrote the alterations. And it seems it is indispensable to mention, who is the writer of the addition, and that it was signed by the party; but see 1 Br. Sup. 529; M. 16,811; M. 16,817; *King* v. *Greenock Bank*, 14 S. D. 351. If a marginal addition is not mentioned in the testing clause, it is not probative of its date; M. 16,927; M. 17,063; Stair, 4, 42, 19; and parole evidence will not be allowed that the erasure was made before signature. *Kedder* v. *Reid*, 1 Rob. Ap. 183; *Grants* v. *Shepherd*, 6 Bell's Ap. 153.

[2] *Contra;* unless mentioned in the testing clause. See last note. But it is only an erasure *in essentialibus* that vitiates a deed. *Peddie* v. *Macvicar*, 29 Sc. Jur. 395; *Boswell* v. *Boswell*, 14 D. B. M. 378.

[3] The same, since 1856, 19 & 20 Vic. c. 89; but the number of pages must be stated in the testing clause. *Smith* v. *N. Brit. Ins. Co.* 12 D. B. M. 1132.

Deeds.

350. *Signing each page.*—If a deed is on several pages, a party need not sign his name at the foot of each page.[1]

351. *Holograph deeds.*—If a party write or engross a deed with his own hand, it must be executed before one or more witnesses, and proved as in other cases.[2]

352. *Debts secured by deed.*—A deed, unlike other writings not sealed, imports a consideration.[3] And this distinction is important, for a deed is the only effectual way of making a gift of personal chattels, unless the possession of such chattels is actually delivered.[a] Debts secured by deeds or writings under seal are also entitled to priority over simple contract debts, in the event of the debtor dying intestate, and his estate being insufficient to pay all the debts.[b] [4]

353. *Proving a deed.*—When a deed is given in evidence at a trial for whatever purpose, though it appears *ex facie* to be duly executed, it does not prove itself by mere production.[5] It is neces-

[a] 2 Steph. Com. 44; *Shower* v. *Pilch*, 4 Exch. 478; *Martindale* v. *Booth*, 5 B. & Ad. 506.
[b] See *post*, "Succession."

IN SCOTLAND.

[1] *Contra.* Stat. 1696, c. 15. A party must sign at the foot of each page, unless the pages are on one sheet, and then it suffices to sign the last page. *Smith* v. *Bank of Scotland*, 4th July 1816, F. C. But the witnesses sign only on the last page. See *Edinburgh and Glasgow Bank* v. *Galbreath*, 28 Sc. Jur. 205; 31, *Ib.*

[2] *Contra.* A holograph deed is privileged, and will receive effect, though there is no witness, and the writer is not named in the deed. Stair, 4, 42, 6; Ersk. 3, 2, 22; *Anderson* v. *Anderson*, 30 Sc. Jur. 497; 3 Macq. Ap. 180; *Provost of Dundee* v. *Morris*, 30 Sc. Jur. 528; 3 Macq. Ap. 134. A deed can be holograph in general, only when the writer is the sole granter. *Miller* v. *Farquharson*, 13 S. D. 839; *Bryson* v. *Crawford*, 12 S. D. 39; *Laurie* v. *Laurie*, 31 Sc. Jur. 129. If the holograph deed has no testing clause, and shews no date, then the date must be proved by parole evidence. Ersk. 3, 2, 22; *Waddell* v. *Waddell*, 7 D. B. M. 605.

[3] *Contra;* a deed is in this respect on the same footing as other writings.

[4] *Contra;* there is no priority on that ground, and no distinction exists between specialty and simple contract debts. See *post*, "Succession."

[5] *Contra.* It is probative, *i.e.*, the deed proves itself, if it purports to bear the statutory solemnities, viz., if there are subscribing parties and witnesses, and a proper testing clause. If signed by initials only, it is not probative, and, in general, evidence of a custom to sign by initials is necessary. Ersk. 3, 2, 8; M. 16,802; M. 16,803; *Monro* v. *Monro*, Hume 81. If the deed is not attested and signed by witnesses, no proof of authenticity in the signature of the party is allowed. M. 17,021; 16,974; 8449; *Duff* v. *E. Fife*, 2 W. S. 166.

sary to call the witness, if alive, who must swear to its execution; or if dead, his handwriting must be proved.[a] But if the deed is thirty years old, and is unblemished by alterations, and comes from the proper custody, this proof is deemed unnecessary, and the deed proves itself.[b]

354. *Notary authenticating deed.*—The services of a notary are seldom required to authenticate deeds or acts; the evidence of ordinary witnesses being of equal efficacy.[1]

355. *Setting up nullity of deed.*—Where a deed is invalid from being altered or erased in substantial parts after execution, or from other causes, a party may, if sued in a court of law, raise the objection as a bar to the action, without previously setting aside the deed.[2] He may, in some cases also, take the initiative himself by filing a bill in the Court of Chancery to set aside the deed, or have it delivered up to be cancelled.[c]

CONVEYANCES OF LAND.

356. *Conveyance of a fee-simple.*—Until 1841, the usual conveyance on a purchase of freehold estate was by two deeds, called a lease and release. From that date till 1845, the expense of two deeds was rendered unnecessary, and a release only was declared sufficient.[d] Finally, it was declared by statute to be competent to convey freehold estate by a deed of grant simply; in other words, all corporeal tenements and hereditaments were declared to lie in grant as well as in livery.[e] A deed of grant was formerly the appropriate common law conveyance of an incorporeal hereditament.[f]

[a] Taylor on Evid. § 1641 *et seq.*
[b] *Ibid*, § 74.
[c] *Hayward* v. *Dimsdale*, 17 Ves. 112; *Bromley* v. *Holland*, Coop. 29.
[d] 4 & 5 Vic. c. 21.
[e] 8 & 9 Vic. c. 106, § 2.
[f] 2 Prest. Shep. T. 228.

IN SCOTLAND.

[1] *Contra;* his intervention is in many instances absolutely necessary. He was indispensable as a witness, and drew up the instrument of sasine; and he has still to authenticate certain facts connected with the title by notarial instrument, in substitution of the old instrument of sasine. 21 & 22 Vic. c. 76, § 2. He must also authenticate deeds on behalf of a party who cannot write. See *ante*, § 347.

[2] In general a defect in a deed cannot be taken advantage of by way of defence to an action, but the party must first reduce the deed by a substantive action of reduction.

Conveyances of Land.

357. *Feoffment.*—The old common law conveyance of an estate in fee-simple, which is still competent though seldom used, is a feoffment.[1] The feoffment consists of two distinct acts; *first*, Livery of seisin or delivery of possession, which was all that the common law required; *secondly*, A written explanation, signed by the feoffor, was required by the Statute of Frauds; and by a late statute, this writing must be by deed.[a] It is necessary that the deed should mark out, by the proper limitation, the estate given. And it seems, if no consideration for the gift be stated, the feoffment must be expressed to be not only unto, but "unto and to the use of" the feoffee.[b] [2]

358. *Livery of seisin.*—Livery of seisin is of two kinds, viz., livery in deed, and livery in law. Livery in deed is an actual delivery of some symbol of possession, as a hasp of the door, a twig, or turf on the land, accompanied with apt words.[c] Livery in law is not made on the land, but in sight of it only; and does not transfer the land till entry is made; and hence, if either the feoffor or feoffee dies, it becomes void.[d] [3] Livery in deed may be given and received by attorney.[4] No notary ever required to be an essential witness of the transaction, nor did two witnesses besides require to be present.[5]

359. A memorandum of livery of seisin was usually indorsed on ancient feoffments; but where possession had followed for a length of time, courts of law and equity presumed livery of seisin had been given, though not indorsed on the deed.[e] [6]

[a] 1 Prest. Shep. T. 203; 2 Bl. Com. 310; 8 & 9 Vic. c. 106, § 3.
[b] Willms. Real Prop. 137.
[c] Co. Litt. 48 *a*; 2 Bl. Com. 315.
[d] Co. Litt. 48 *b*; 2 Bl. Com. 316.
[e] 4 Cruise T. 32, c. 4, § 16.

IN SCOTLAND.

[1] This is the common and universal mode of conveyance; but the deed or disposition precedes the sasine or infeftment. See per L. Brougham, in *Morton* v. *Hunter*, 4 W. S. 379, *post*, § 358.

[2] The words "to the use of" are not necessary.

[3] *Contra;* this is not the case, by stat. 1693, c. 35; Bell's Pr. § 766.

[4] The bailie and attorney in like manner, represented the parties respectively, previous to the recent changes. See § 359 *n.*

[5] *Contra;* these were necessary. Bell's Pr. § 770.

[6] The instrument of sasine or infeftment was a separate and lengthy document on parchment, narrating and repeating many things. It began with an invocation in the name of God, and ended with a Latin docquet, authenticating the instrument and again attesting the truth of the ceremony, as seen, known, and heard by the notary and witnesses personally present. This instrument was the only admissible evidence of the sasine, and it

360. *Lease and release.*—The conveyance by lease and release was as follows:—The vendor granted a lease to the vendee, who thereupon entered into possession. The vendee was then in a position to acquire the feudal possession, without any formal livery of seisin, by a transfer or conveyance from his landlord of all the landlord's remaining estate in the premises. This conveyance, which was by deed, was termed a release, and conveyed the freehold as effectually as a feoffment.[a] After the passing of the Statute of Uses, a mere verbal bargain and sale had the effect of conveying the seisin without actual entry. But soon by statute, the bargain and sale of a freehold estate was required to be made by deed indented and enrolled within six months.[b] The latter statute did not apply to a bargain and sale for a year only, and hence it became usual for the vendee to pay some merely nominal consideration, such as 10s. for a lease of one year; and having thus acquired the seisin without entry, the vendor thereon released his remaining estate, and this was termed a conveyance by lease and release.[c] The lease required, after the passing of the Statute of Frauds,[d] to be by writing, and was generally dated the day before the release, though it was in practice executed on the same day, immediately before the release. The deed of lease and release has lately fallen into disuse, since a deed of grant has been rendered by statute sufficient for the same purpose.[e] [1]

[a] 2 Sand. Uses, 61; Shep. Touch. 320.
[b] 27 Hen. VIII. c. 16.
[c] 2 Prest. Conv. 219; Gilb. Uses by Sugd. 328, 329.
[d] 29 Ch. 2, c. 3.
[e] 8 & 9 Vic. c. 106.

IN SCOTLAND.

required by statute to be recorded in the register of sasines within sixty days. Stair, 2, 3, 16; Ersk. 2, 3, 36; Bell's Pr. § 771. After several abbreviations in this formality, made in recent times, the instrument of sasine has at last been declared no longer necessary, and the disposition or conveyance itself may, instead, be recorded in the register of sasines applicable to the lands. The conveyance must be presented with a warrant of registration in a certain form, and on being recorded it will have the same legal force and effect, as if an instrument of sasine had been duly expede and recorded at the same date. 21 & 22 Vic. c. 76, § 1, 19. But where any obligations, burdens, conditions, &c., required formerly to be inserted or referred to in the instrument of sasine, these may be now inserted in a separate notarial instrument to be recorded in the register; § 29.

[1] There has been no such change in the form and effect of conveyances; the general deed, as between vendor and vendee, being a disposition. As to the deeds following thereon, completing the title of the vendee as between him and the superior, see *post*, § 364.

Conveyances of Land.

361. *Form of modern conveyance.*—An ordinary purchase deed is in the nature of an indenture,[1] and consists of the following parts :—

1. The *date* of the deed.

2. The *parties*, *i.e.*, the names of parties and their descriptions.

3. The *recitals*, *i.e.*, the recital of the last conveyance to the vendor, and of the contract for sale.[2]

4. The *testatum*, or the witnessing or operative part marked by the words, "now this indenture witnesseth that," which includes a statement of the consideration-money and the receipt.

5. The *parcels*,[3] *i.e.*, giving an accurate description of the lands conveyed, with their abuttals, and followed by some general words to include the incidents, accessories and appurtenances, the whole ending with the words "and all the estate and right of the vendor in and to the same." Here also any *exceptions* out of the conveyance ought to be specified.

These five preceding parts are often called "the premises" of the deed.

6. The *habendum*,[4] to point out what estate is given, and commencing with the words "to have and to hold." If this part is irreconcilable with the premises, it will be rejected so far as inconsistent therewith. [a]

[a] 9 Jarm. & Byth. by Sweet, 460, 86, 170.

IN SCOTLAND.

[1] *Contra ;* the disposition is generally in the form of a deed poll, signed by the vendor only. Where the vendor wishes to create a superiority and make the vendee his vassal, this is done by a charter (*i.e.*, a deed poll) or a feu-contract (*i.e.*, an indenture).

[2] The disposition consists of the following clauses :—(1.) The *narrative clause* gives the name and description of the party, and narrates the consideration and receipt of the money.

[3] (2.) The second clause, the *dispositive clause*, gives the name of the disponee, the subjects, *i.e.*, the lands and their boundaries, and any real burdens or reservations (*i.e.*, exceptions) affecting the subjects.

[4] (3.) The third clause, viz., the obligation to infeft, was a clause obliging the vendor to infeft the disponee by two infeftments and manners of holding, and that either by resignation or confirmation, in other words, to hold *a me vel de me*. This clause is now implied. 21 & 22 Vic. c. 76, § 5. See *post*, § 364 *n*. The fourth clause is a procuratory of resignation, *i.e.*, authorising some one to appear and resign the lands to the superior in favour of the vendee (surrender to the use of the purchaser), etc.

7. Then follow the *covenants*[1] by the vendor with the purchaser for the title, which are five in number, viz., that the vendor is seised in fee-simple—that he has good right to convey the lands—that they shall be quietly enjoyed—that they are free from incumbrances, and that the vendor and his heirs will make any further assurance for the conveyance of the premises, which may be reasonably required. The first covenant is now usually omitted, being included in the second. Here also any other covenants are introduced.

8. The *testimonium*, or conclusion, also called the attestation clause. The attestation is not considered as part of the deed.[2]

9. The seals[3] and signatures of the parties.

Technical words of conveyance.—There is no single word in a purchase deed which is considered indispensable to express the intention of the grantor to alienate the land. Thus, though the word "grant" is the proper and technical term employed in a deed of grant, other words indicating an intention to grant are held to be equivalent.[a 4]

362. *Receipt for purchase money.*—The receipt for the consideration money is generally indorsed on the back of the conveyance. If the recital states that the money has been paid and received, this is an estoppel at law; but a receipt on the back of the deed is no estoppel, being merely presumptive evidence. And in equity, none of

[a] Shep. Touch. 229; *Shove* v. *Pincke*, 5 T. R. 124; *Haggerstone* v. *Hanbury*, 5 B. & C. 101.

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[1] (5.) The fifth clause, viz., clause of warrandice (*i. e.*, a covenant by the vendor) is absolute, and is the security in case of eviction. (6.) The sixth clause is an assignation to the rents and title-deeds. (7.) The seventh clause is a clause of warrandice of said assignation (covenant of good right to convey). (8.) The eighth clause is an obligation to free the subjects of public burdens. (9.) The ninth clause is a clause of delivery of the title-deeds. (10.) The tenth clause is a clause of registration. (11.) The eleventh clause is a precept of sasine. The fifth and seventh clauses now generally form one clause; and the order of the others varies. See 1 Jurid. Styles, 94 (4th ed.)

[2] *Contra;* the twelfth clause, viz., the testing clause, is a most important clause, and is part of the deed. See *ante*, § 344.

[3] No seals are necessary. See *ante*, § 335.

[4] *Contra;* the word "dispone" is considered indispensable, as the only fit term, or *vox signata*, to express a *de presenti* conveyance; and no other words, however clear, are received as equivalent. Per L. Meadowbank, *Hamilton* v. *Macdowal*, 3d March 1815, F. C.; 1 Ross, L. C. 21.

these are of any avail, if non-payment can be proved, such proof being competent by oral evidence.[a] [1]

363. *Possession under conveyance.*—The conveyance contains no formal authority to give possession [2] to the vendee, the vendee being entitled, according to the nature of his estate, to possession as the necessary result of the conveyance.

364. *The vendee's relation to vendor's lord.*—The vendee is not obliged, except in the case of copyholds, to have any further title, so as to secure and perpetuate his villeinage to any lord of the fee who may exist; and there are few cases in which a lord of a freehold estate now exists.[3]

[a] Sugd. C. V. 537; 1 Jarm. & Byth. by Sweet, 90; 5 Id. 552; 9 Id. 78; *West* v. *Reid*, 2 Hare, 249.

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[1] *Contra.* If the payment and receipt of the price are stated in the narrative clause, this can be contradicted only by the writ or oath of the vendee or disponee. Gordon, 11th June 1833, F. C.

[2] *Contra;* there is a precept of sasine. See *ante*, § 361 *n.*

[3] *Contra.* As every vendor is a vassal either of the Crown or of some vassal, immediate or remote, of the Crown, called a superior, the vendee has not merely to get a sufficient title from his vendor, but he is, in general, also bound, at his own expense, to go to the vendor's superior, and renew his vassalage. In Bell's Com. by Shaw, 77, the law as it stood up to 1858 is thus stated: "As the vassal's estate continues unextinguished in his person, till, with his consent and with the sanction and authority of his superior, a new sasine shall supplant the first, and transmit the estate to another person, the regular way of accomplishing this is by means of resignation in the hands of the superior, for the purpose either of obtaining from him a new grant in favour of another, or, it may be, by reuniting the property in the superior himself. The former is called resignation *in favorem*, the latter resignation *in remanentiam*. The same end may be accomplished by another mode. A conveyance or disposition is granted by the vassal who sells the property, containing a precept of sasine by him, requiring infeftment to be given to the purchaser to be held of the vassal's superior, or, as it is expressed, *a me de superiore meo*. But as it is necessary that the disposition and sasine be confirmed by the superior, the latter grants and may be compelled to grant a charter of confirmation. Further, as every feudal proprietor has the power of conveying his estate to another, although he himself is a vassal, he may grant a disposition of his estate to a purchaser, containing a precept of sasine to be held of himself—the purchaser becoming vassal to the seller, thus leaving in the seller a superiority intermediate between his own superior and the purchaser. This is called a holding *de me*. The purchaser may prefer to follow this course, because he is thus vested instantly with the

365. *Different kinds of deeds.*—The deeds called common law conveyances, are chiefly feoffments, gifts, grants, bargains and sales, leases, exchanges, partitions, releases, confirmations, surrenders, assignments, defeasances, disclaimers, some of which relate either to real or personal estate. Other deeds are also called statutory deeds, as deeds of lease and release—covenants to stand seised to uses—deeds of appointment under powers. Some deeds are not properly termed conveyances, as deeds of covenant or agreement relating to real estate, bonds, declarations of trusts of real estate, deeds of appointment of trustees, of receivers, etc.[1]

Language of deeds.—Conveyancers are paid solely by the length of the deed, or the number of words used.[2]

REGISTRATION OF TITLE.

366. *No general register.*—There is no general register for title-

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dominium utile (see *ante*, § 18 *n*), which is the valuable estate, and secured against competitors; while some time is necessary to complete the title in entering with the superior, during which there is danger of being cut out by purchasers or creditors of the seller. The modern disposition combines these two latter modes. It contains a precept to infeft the purchaser to hold either of the seller's superior (*a me*) or of the seller himself (*de me*); this is called an alternative holding. The effect of sasine taken on this indefinite precept is to complete at once a feudal right of *dominium utile*, and to be convertible into a perfect feudal estate by the superior's confirmation, so as to place the purchaser precisely in the place of the seller, and to drop the latter out of the feudal chain." The stat. 21 & 22 Vic. c. 76, reduces some of these charters in length and changes their form; it also renders a clause of obligation to infeft no longer necessary. § 5. Where the vendor does not specially agree to give a holding *de se*, he can only be compelled to give a holding *a se*. *Miller* v. *Young*, 6 D. B. M. 149. But the practice is to give an alternative holding. As to the sasine or infeftment, see *ante*, § 359 *n*.

[1] The general name of a purchase-deed is a disposition, which may also, according to circumstances, be a trust-disposition and settlement (will), or a contract of marriage (settlement), or a deed of entail. Where the vendor creates a tenure between himself and the vendee, the conveyance is either a feu-charter or feu-contract. There are also grants or writs by progress, as between the vassal's heir or purchaser and the superior, such as instruments and writs of resignation, writs of confirmation, writs of clare constat, etc.

[2] *Contra*; it is in the option of the agent (solicitor) to charge either by the length of the deed, or partly by length and partly by an *ad valorem* commission on the purchase-money.

Registration of Title.

deeds affecting lands. On the sale of an estate, all the title-deeds in the hands of the vendor, which relate exclusively to the property sold, are handed over to the purchaser. The possession of the deeds is the chief and only protection[1] which the purchaser has; for if they were allowed to remain in the vendor's hands, he might re-sell or mortgage the lands to other persons. When a vendor has the deeds in his hands, it is some guarantee that the lands have not been mortgaged. But the possession of the title-deeds is no safeguard against an annuity or rent-charge, payable out of the lands; nor that the vendor has not by marriage-settlement reduced his interest to a life estate. In the case of copyholds, the court rolls of the manor serve the purpose, to a great extent, of a local register.[a]

367. *Search for incumbrances.*—There are certain matters affecting titles, which may be discovered by any purchaser. Thus disentailing deeds must have been recorded in the Common Pleas before 1833, and since that date in the Court of Chancery.[b] Deeds acknowledged by married women are discoverable from certificates thereof kept in the Court of Common Pleas.[c] Judgment debts must be registered in the Court of Common Pleas.[d] So as to Crown debts and *lis pendens*.[e] Annuities charged on land prior to 1854 in the Court of Chancery; and since 1855, unless created by marriage-settlement or will, in the Court of Common Pleas.[f] So the bankruptcy or insolvency of the vendor may be discovered by a search in the records of the Bankrupt or Insolvent Courts.

[a] See *ante*, § 175, 184.
[b] 3 & 4 W. IV. c. 74, § 41.
[c] *Ibid.*, § 74, 87, 88.
[d] 1 & 2 Vic. c. 110; 2 & 3 Vic. c. 11; 3 & 4 Vic. c. 82; 18 & 19 Vic. c. 15; 23 & 24 Vic. c. 38; 27 & 28 Vic. c. 112.
[e] 2 & 3 Vic. c. 11, § 7, 8.
[f] 53 Geo. III. c. 141; 3 Geo. IV. c. 94; 7 Geo. IV. c. 75; 17 & 18 Vic. c. 90; 18 & 19 Vic. c. 15.

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[1] *Contra*; as most of the deeds are on the register, the possession of the deeds is not so vital. Infeftment completes the vendee's title, and gives him a preferable title to all real creditors who have not taken infeftment, and such infeftment required to be registered; but it is now enough to register the conveyance itself. 21 & 22 Vic. c. 76; 23 & 24 Vic. c. 143.

[2] The search for incumbrances is founded on the negative prescription, 1617, c. 12, which cuts off the right of action after forty years. The registers of sasines and reversions, of inhibitions and of adjudications, exhibit most of the burdens attaching to lands; but some dangers exist, which do not appear from the registers, the chief of which are litigiosity (*lis pendens*), deathbed, claims of ancestors, creditors, minority, etc.

368. *Register counties.*—Where the lands are situated in Middlesex, Yorkshire, or Kingston-upon-Hull, a memorial of every deed or will affecting the lands must be duly registered, otherwise the deed or will will not prevail against subsequent purchasers or mortgagees.[a][1] There is also a local registry for the lands originally forming part of Bedford level.[b]

369. *Land Registry.*—A mode is now provided by statute for obtaining and registering indefeasible titles to freehold and leasehold estates, and thereby all future sales are greatly facilitated; but at present this is not compulsory.[c]

370. *Register of deeds generally.*—There is no general register in which deeds, whether affecting lands or not, can be deposited for safe custody;[2] but wills of living persons may now be deposited in the Court of Probate for that purpose.[d]

[a] See statutes, *ante*, § 94.
[b] 15 Ch. II. c. 17, § 8; *Willis* v. *Brown*, 10 Sim. 127.
[c] 25 & 26 Vic. c. 53; 25 & 26 Vic. c. 67.
[d] 20 & 21 Vic. c. 77, § 91.

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[1] *Contra;* the register is universal, extending to the whole country, the object being to preserve and publish the deed; so that purchasers can always ascertain the condition of the ownership and its incumbrances. These registers connected with land are the following:—1. The *registers of sasines and reversions*, 1617, c. 16. 2. The *register of entails.* 3. *Register of adjudications* (elegits). 4. *Register of inhibitions* (injunctions against the alienation or incumbering of lands). 5. The *register of interdictions.* 6. *Register of long leases;* 20 & 21 Vic. c. 26. 7. *Register of interruptions of prescription by means of citations.* All deeds and instruments must thus be recorded which are necessary to the constitution, transmission, and extinction of rights to land and to incumbrances on land. There is one general register at Edinburgh applicable to the whole of Scotland; also particular registers for each county, or for a union of counties. It is optional to record either in the general or the particular register. Each volume in the particular register, when filled, is transmitted to the general register. The order of registration is regulated by the entry in the minute-book of the day and hour of presentment of the deed to the office. A *literatim* copy of the deed is made in the office-books, and the original is then returned to the party. Searches are made in the general register since 1853 by official searchers. In every royal burgh there is a separate register for lands held on burgage tenure. The custody of all the registers is under the care of the Lord Clerk-Register.

[2] *Contra;* there is a general register for the custody of all deeds and probative writs, both for preservation and for execution. (As to registration for execution, see *post*, § 439, 448, 480, 1117.) For this purpose the parties insert a clause of registration in the deed. In such a case the original deed is kept by the registrar, as well as copied into his books, and an extract

CHAPTER XV.

LANDLORD AND TENANT.

373. *Lease binding on reversioner.*—A lease, at common law, is good against purchasers of the reversion, or of the lessor's interest in the land.[1]

374. *Lease, verbal or in writing.*—A lease for more than three years must be in writing, but a verbal lease for three years, or for a less term, if the rent reserved is two-thirds of the full improved value of the lands, is good.[a 2] The writing required in leases for more than three years must be by deed.[b]

375. A verbal lease for more than three years is good as a lease from year to year on the terms of the lease, so far as applicable, if the tenant has entered, and paid rent.[c]

376. If a written lease is imperfect, the mere entry of the tenant does not at law set up the lease for the whole term, but may make it bind-

[a] Stat. Frauds, 29 Ch. II. c. 3, § 1, 2.
[b] 8 & 9 Vic. c. 106, § 3; *Drury* v. *Macnamara*, 5 E. & B. 612.
[c] *Doe d. Tilt* v. *Stratton*, 4 Bing. 446; [d] *Doe d. Bromfield* v. *Smith*, 6 East. 530; *Lee* v. *Smith*, 9 Exch. 662; *Tress* v. *Savage*, 4 E. & B. 36.

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(certified copy) is given out to the party. Where the deed does not contain a clause of registration, it may, nevertheless, be registered for preservation; but in that case the original, after being copied, is returned to the party. Besides a general register in Edinburgh, there is also a particular register for like purposes in each sheriff court and in each royal burgh.

[1] *Contra;* it required a statute, 1449, c. 17, to render a lease good against singular successors, but even then the lease must be in writing, and the tenant must be in possession. 2 Bell's Ill. 176, 183, 214; *Sinclair* v. *Mossend Co.* 17 D. B. M. 258.

[2] *Contra;* a verbal lease is good only for one year, unless the lessor, by writ or oath, admit it. Bell's Pr. § 1187. If the verbal lease is for more than one year, it is not good even for a year (Stair 2, 9, 4; Ersk. 2, 6, 30; 2 Bell's Ill. 176-7), unless *rei interventus* or homologation occur. *Ross* v. *Ross*, Hume, 784; *Ibid*, 782; *Ibid*, 786.

ing on the landlord[1] as a lease from year to year.[a] But though part performance will not set up[2] the lease in a court of law, yet a court of equity will, in many cases, grant specific performance on that ground. And entry into possession is in general deemed a part performance.[b]

377. *Form and clauses of lease.*—A lease by deed is usually in the form of an indenture, and consists of the following clauses:—1. The date, parties, and demise; 2. The parcels, stating the exceptions; 3. The habendum; 4. The reddendum; 5. The covenants by both parties; 6. The provisoes for re-entry on breach of covenants; 7. The testimonium.[3]

378. *Registration of leases.*—Leases of lands for a longer term than twenty-one years must be registered, if the lands are in the county of Middlesex, York, and the Bedford Level, otherwise they will be void against subsequent purchasers and mortgagees.[c] So must assignments of the leases.[c] [4] But in other counties the leases do not require to be registered, and there is no register for the purpose.

[a] *Ibid; Stratton* v. *Pettit*, 16 C. B. 420.
[b] *Pain* v. *Cooms*, 1 De G. & J. 34; *Parker* v. *Taswell*, 4 Jur. N. S. 183.
[c] See the statutes, *ante*, § 94*n*.

IN SCOTLAND.

[1] *Contra;* it will bind the landlord for the whole term, if possession followed, and if the nature of the possession implied that the whole term was in view. See *Johnston* v. *Grant*, 6 D. B. M. 881; Bell's Pr. § 1190; Hunter, L. & T. 415; *Pentland* v. *Murray*, 5 W. S. 28. Much greater effect is given to possession of the tenant in the law of Scotland than in the law of England. *Per* L. Truro in *Hutchinson* v. *Ferrier*, 24 Sc. Jur. 404; 1 Macq. 196.

[2] *Contra.* See last note. There being no division of courts into those of law and equity, *rei interventus* (or part performance) and homologation (or conduct amounting to an estoppel, or acquiescence, or confirmation) will at once set up the lease. See Bell's Com. by Shaw, 60.

[3] The lease consists of the following clauses:—1. The clause of description of parties; 2. The clause of destination (part of habendum); 3. The clause of possession describing the subjects (parcels); 4. Clause of duration (part of habendum); 5. Clause of reservation (exceptions); 6. Clause of warrandice (covenant for quiet enjoyment); 7. Clause of rent (reddendum and covenant to pay); 8. Clause of meliorations (covenant to repair and as to improvements); 9. Clause of removal (covenant to yield up possession and quit the premises); 10. Clause of registration; 11. Testing clause.

[4] Long leases, *i.e.*, of thirty-one years and upwards, and assignations thereof, may, since 1857, be registered in the register of sasines, and priority of title is regulated by the date of the registration. See 20 & 21 Vic. c. 26. As regards other leases no registration is necessary.

379. *Lease must be for term certain.*—A lease for years must have some definite termination.[a] [1] If a lease is made for years, but not specifying how many years, the lease will be good for two years certain, because for more there is no certainty, and for less there can be no sense in the words.[b]

A lease for a term, however long, if the term is certain, is as good against purchasers of the inheritance as for a short term.

Though there must be some definite termination of the lease, yet the lessor may covenant for perpetual renewal of the lease.[c] [2]

380. *Entry of lessee*—In leases for years, livery of seisin was never necessary; but an actual entry by the tenant is necessary to vest the estate in the lessee, for to many purposes he is not a tenant for years till he enters.[3] On entry his title is complete.

381. *Lease as a mortgage.*—Leases are sometimes granted by way of mortgage under a condition to be void on payment of the purchase money; and these leases are good against [4] purchasers of the inheritance.

382. *Underlease to mortgagee.*—Leases are often mortgaged either

[a] Bac. Abr. "Leases."

[b] *Bishop of Bath's* case, 6 Rep. 35; *Fitzmaurice* v. *Bayley*, 6 E. & B. 868.

[c] *Hare* v. *Burgess*, 4 K. & J. 45; *Copper Mining Co.* v. *Beach*, 13 Beav. 478; *Smythe* v. *Nangle*, 7 C. & F. 405.

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[1] *Contra;* the lease, though having no ish or definite termination, as where it is expressed to be "without ish" or "for ever," will bind the landlord and his heirs; *Carruthers* v. *Irvine*, M. 15,195; Bell's Pr. § 1194; but it will not bind singular successors (purchasers) without notice. 2 Bell's Ill. 178-9. Where the lease has no definite termination, it is construed as a lease for one year, unless the words imply a longer period; and in the latter case it is construed as a lease for the most limited term the words admit of. But there is no clear rule on the subject. See Bell's Com. by Shaw, 873; Bell's Pr. § 1194; Ersk. 2, 6, 24.

[2] *Contra;* leases of a definite term, but with a renewal from term to term, are not effectual against singular successors. See last note.

[3] The stat. 1449, c. 17, treating possession as equivalent to sasine, conferred on tenants in possession a real right. Ersk. 2, 6, 25.

[4] *Contra;* leases made to depend, as regards their duration, on the payment of a debt, are not valid against singular successors, because the termination of the lease is uncertain. Bell's Pr. § 1194; Stair 2, 9, 28; Ersk. 2, 6, 24; 2 Bell's Ill. 179. See next note.

by the tenant granting an assignment or an underlease to the mortgagee, usually the latter.[a] [1]

383. *Creditors taking lease in execution.*—Where there is a covenant not to let or assign, this does not prevent creditors of the lessee taking the lease in execution.[b] So it does not prevent [2] the assignees of a bankrupt lessee from taking the lease. To do these things effectually, there must be declared an express proviso of re-entry on the tenant becoming bankrupt,[c] or on the term being taken in execution.[d] But when the tenant becomes a bankrupt, and there is no such proviso of re-entry in the lease, the assignees may elect whether they will accept or decline the lease.[e] [3]

384. *Surrender of lease.*—A surrender of the lease or term, if

[a] *Williams* v. *Bosanquet*, 1 B. & B. 238; *Westerdall* v. *Dale*, 7 T. R. 312; *Barton* v. *Barclay*, 7 Bing. 745; 5 M. & P. 785.

[b] *Doe d. Mitchenson* v. *Carter*, 8 T. R. 57; *Croft* v. *Lumley*, 6 H. L. C. 672.

[c] *Wadham* v. *Marlow*, 1 H. Bl. 438 *n*; 2 Chitt. 600.

[d] *R.* v. *Topping*, M'Cl. and Y. 544.

[e] 12 & 13 Vic. c. 106, § 14.

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[1] It was considered difficult to do this (Hunter, L. & T. 493; Bell's Pr. § 1212), because it allowed a latent right, which is odious to the law. See *Brock* v. *Cabell*, 3 W. S. 75; 5 W. S. 476; 2 Bell's Ill. 184. But now this may be done as to long leases above thirty-one years, by registration under the Act, 20 & 21 Vic. c. 26, § 4, 6, and if the payment of interest is six months in arrear, the creditor or mortgagee may petition the sheriff for authority to enter into possession of the lands.

[2] *Contra;* an express exclusion of assignees and subtenants (in agricultural leases the exclusion is implied) effectually excludes creditors from adjudging the lease. Ersk. 2, 6, 31; Eliot, M. 10,334; M. 15,307; 2 Bell's Ill. 186; *Borrows* v. *Colquhoun*, 26 Sc. Jur. 641; 1 Macq. 691. But creditors may insist on the tenant granting an assignation or sublease, taking the chance of the landlord objecting, unless the exclusion is fortified by an irritancy of the tenant's right.

[3] If the tenant is sequestrated, his trustee takes the lease so far as the tenant could convey. 19 & 20 Vic. c. 79, § 102. But the creditors cannot force him to give up the lease where assignees and sub-tenants are excluded; they can only have execution against his person and his crops, etc. See *Kirkland* v. *Wilson*, 6 W. S. 340; *Strathmore* v. Kirkaldy, 15 D. B. M. 752. And the bankrupt-tenant, not himself in possession, cannot appoint a manager to possess and account to the creditors; for this is an implied assignation. *Monro* v. *Miller*, 11th Dec. 1811, F. C.; *Sydserf* v. *Todd*, 8th Mar. 1814, F. C. The lease should contain a declaration of forfeiture on such contingencies clearly expressed. *Moncreiff* v. *Hay*, 5 D. B. M. 249; *Young* v. *Gerrard*, 6 D. B. M. 347; Bell's Com. by Shaw, 900-1.

exceeding three years, must, since 1845, be made by deed;[a 1] but there are acts which amount to an implied surrender, or surrender by operation of law, or by mutual consent.

385. *Building leases.*—In cities and large towns it is a common practice for builders and others to take building leases, which are generally for a term of ninety-nine years. At the expiration of the lease, the houses built become the absolute property of the landlord or reversioner.[2]

386. *Building on another's ground.*—Independently of the relation of landlord and tenant, if a stranger build upon another's ground, though acting *bona fide*, the building becomes *ipso facto* the property of the owner of the land, and the stranger has no claim at law or equity either for the materials or their value. But if the owner of the land stood by and saw it done, a court of equity would give him no assistance until he did equity by paying for the materials.[b 3]

387. *Lease belongs to executor.*—On the tenant's death, the lease goes to the executor,[4] and not to the heir-at-law.

388. *Implied right to assign and sublet.*—Where there is no covenant or agreement not to let or assign, the lessee may freely assign or sublet,[5] whether the premises be a house in town or a farm in the country. But a lease very often contains a covenant on the part of the tenant, either not to assign, or not to assign without the

[a] 8 & 9 Vic. c. 106, § 3.

[b] *D. Leeds* v. *Amherst*, 2 Phill. 123; *Rochdale Canal Co.* v. *King*, 2 Sim. N. S. 78; 16 Beav. 632.

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[1] The renunciation must generally be by writing (Bell's Pr. § 1265; Ersk. 2, 6, 44), and after the term has ceased, it may be proved by the oath of party. 2 Bell's Ill. 214.

[2] For such purposes the builder generally takes a feu (hence often called building feus), which is an estate of inheritance; and the price, either in whole or part, assumes the shape of an annual feu-duty.

[3] *Contra;* the owner of the ground is liable, in such a case, for the value of the materials, at least so far as he is *lucratus*. This is said to be on the doctrine of recompense. Ersk. 2, 1, 15; 3, 1, 11; Bell's Pr. § 937; *Innes* v. *D. Gordon*, 4 W. S. 305. See also *post*, § 394 *n.*

[4] *Contra;* the lease is heritable and goes to the heir, even though there is no express destination to the heir. Bell's Pr. § 1219.

[5] *Contra;* in agricultural leases of ordinary duration, *i. e.*, nineteen years, there is an implied *delectus personæ*, and the tenant cannot assign or sublet, unless there is an express power to do so. Bell's Pr. § 1216; 2 Bell's Ill. 186; *E. Glasgow* v. *Hamilton*, 13 D. B. M. 1290.

consent of the lessor. A covenant against assigning does not include a covenant against subletting.[a 1]

389. *Implied covenant to stock the farm, etc.*—There is, in the absence of express agreement, no implied obligation on the tenant to put stock on the farm, or furniture in the house;[2] but he is bound to cultivate the farm according to the custom of the country. There is also sometimes a covenant to reside on the premises.

390.—*Taxes, rates, or assessments.*—As a general rule, the tenant or occupier of the premises is primarily liable to bear all public impositions, whether they be parliamentary taxes or poor rates, paving, lighting, watching, water-rates, highway-rates, county and borough rates, or church-rates. The remedy of the collector is primarily against the tenant, in whose hands the land is; but as between the landlord and tenant, the latter may deduct some of these out of the rent, as, for example, the land-tax and property-tax.

There is no tax or rate in respect of parochial schools.[3]

The poor's-rate falls in general entirely on the tenant or occupier, being not a tax on land, but a personal charge in respect of the occupation of the land.[b 4] But questions of nicety often arise as to who is an occupier of land in this sense.

Church-rates, *i.e.*, rates made for the repair of the parish church, are payable by the occupier,[5] and not by the landlord.

[a] *Crusoe* v. *Bugby*, 3 Wils. 235; 2 W. Bl. 776.

[b] 43 Eliz. c. 2; *Rowls* v. *Gells*, Cowp. 452, 1 Doug. 304.

IN SCOTLAND.

[1] The same. 2 Bell's Ill. 186.

[2] *Contra;* the tenant of a farm is impliedly bound to stock the farm properly. Bell's Pr. § 1257, 1273; 2 Bell's Ill. 191; *Baxter* v. *Paterson*, 5 D. B. M. 1074. If the tenant do not enter on the farm and stock it, he can be removed on application to the sheriff. *Tait* v. *Gordon*, 6 S. D. 1055; *M'Kye* v. *Nabony*, M. 6214. So the tenant of a house is impliedly bound to furnish it. *Thompson*, 12 S. D. 557.

[3] *Contra;* the tenant pays the tax for the parochial schools in the first instance, but deducts half thereof from the rent. Act of Privy C. 10th Dec. 1616; Kames' Stat. Law, 457; 43 Geo. III. c. 54; 8 & 9 Vic. c. 40.

[4] *Contra;* it is in the power of the parochial board to levy one half on owners, and the other half on occupiers, or, instead thereof, to tax the whole inhabitants according to their means and substance. 8 & 9 Vic. c. 83. And see *post*, "Poor."

[5] *Contra;* the expense of repairing the church falls on the owners or heritors. Ersk. 2, 10, 63; see *post*, "Church."

Landlord and Tenant.

391. *As to repairs.*—In general, the burden of ordinary repairs, except keeping the premises wind and water tight, is, at common law, thrown on the tenant.[a][1] The landlord of a house does not impliedly covenant that it is reasonably fit for habitation,[b][2] or that it will last during the term of the lease.[c] And if the landlord is to execute the repairs, there is no implied condition that the tenant may quit if they are not done.[d][3] In husbandry repairs, in the absence of special agreement, the tenant is bound only to keep in repair the dwelling-house, and not the outbuildings,[4] homesteads, and other erections on the farm, unless it is the custom of the district to do so.[e]

392. *Cultivation.*—In the absence of special agreement, the tenant is bound only to cultivate according to the custom of the locality, which is implied in every lease.[f][5]

393. *Fences.*—It is the duty of the occupier or tenant, and not of the landlord, to repair the fences.[g][6]

394. *Improvements.*—Where a tenant improves or builds on the

[a] *Pindar* v. *Ainsley*, 1 T. R. 312; *Gott* v. *Gandy*, 2 E. & B. 845.
[b] *Hart* v. *Windsor*, 12 M. & W. 68.
[c] *Arden* v. *Pullen*, 10 M. & W. 321.
[d] *Surplice* v. *Farnsworth*, 7 M. & Gr. 576.
[e] Woodfall, L. & T. 447; *Herne* v. *Benbow*, 4 Taunt. 764.
[f] *Powley* v. *Walker*, 5 T. R. 373; *Beale* v. *Saunders*, 3 Bing. N. C. 850.
[g] *Chetham* v. *Hampson*, 4 T. R. 319.

IN SCOTLAND.

[1] It seems the same. Bell's Pr. § 1254; 2 Bell's Ill. 202.

[2] *Contra;* it is implied by the contract, that the subject will be made effectual to the tenant, or fit for its purpose. Ersk. 2, 6, 39; 2 Bell's Ill. 200. The landlord is said to be bound at common law to put the houses and fences into due repair. 5 Br. Sup. 515; Hailes, 689; *Harrold* v. *Pollexfen*, 6 D. B. M. 1103.

[3] *Contra;* the tenant may himself do the repairs and sue the landlord for the expense; *Baird* v. *Inglis*, 2 Br. Sup. 562; or the tenant may retain the rent till paid. 1 Bell's Com. by Shaw, 878.

[4] The obligation of the tenant extends to out-houses also; Ersk. 2, 6, 39; Bell's Pr. § 1254.

[5] The same. *Allen* v. *Berry*, 3 W. S. 417; *Gordon* v. *Robertson*, 2 W. S. 11; *MacCulloch* v. *Grierson*, 35 Sc. Jur. 34.

[6] The same, but not to repair fences erected by himself or by the landlord after the tenant's entry. *Thomson* v. *Oliphant*, 1 S. D. 184.

leasehold premises, he has, at the termination of the lease, no claim for the value of such improvements, independently of special agreement.[1] But anything like acquiescence of the landlord will entitle the tenant to reimbursement.[a]

395. *Fish, game, hares, rabbits, etc.*—In the absence of stipulation, the tenant has the right to fish for all kinds of fish in the streams of his farm, in every way not prohibited by statute.[b 2]

The right to kill game is not an implied exception in a lease, and therefore the tenant has the exclusive[3] right (if there is no express stipulation) to the game, a trifling exception to this rule by statute having now expired.[c] So the tenant, if otherwise entitled, may kill hares and rabbits without a license.[d 4] A tenant cannot be convicted of poaching on his own farm by night.[e 5] He has no right of action against his landlord for damage caused by excessive preserving of game,[6] unless the latter acted for mere annoyance.

The tenant may kill rabbits, though not having the right to game, and may give leave to a stranger to do so; yet such stranger,

[a] *Thornton* v. *Ramsden*, 10 L. T. N. S. 481.
[b] Paterson's Fish. L. 67.
[c] Paterson's Game L. 11.
[d] 11 & 12 Vic. c. 29; 23 & 24 Vic. c. 90.
[e] Paterson's Game L. 92.

IN SCOTLAND.

[1] *Contra;* if the lease has been determined prematurely and abruptly. Morton, 1 S. D. 322; *Thomson* v. *Fowler*, 21 D. B. M. 453.

[2] *Contra* as regards salmon-fishing by *net*, and higher rights. But the tenant has the right to angle for all fish; Paterson's Fish. L. 213, 223; though, it is said, not to fish with a net; *D. Richmond*, 33 Sc. Jur. 215. *Sed quære.*

[3] *Contra;* there is an implied reservation in all leases of the right of sporting and hunting, and therefore a tenant has no right except by stipulation. M. 4991; Bell's Pr. § 953; Ersk. 2, 6, 6; 2 Bell's Ill. 116. But he has a right to recover surface damages; *Grahame* v. *Mackenzie*, Hume's Dec. 691.

[4] The same, 11 & 12 Vic. c. 30; 23 & 24 Vic. c. 90.

[5] *Contra;* he may; *Smith* v. *Young*, 28 Sc. Jur. 338.

[6] *Contra;* a tenant can sue his landlord for damage caused by excessive preserving, and it seems even obtain an interdict; *Wemyss* v. *Wilson*; *Wemyss* v. *Gulland*, 10 D. B. M. 194, 204. But the tenant cannot use men, dogs, or apparatus, to scare the game; *Ibid.*

if not *bona fide* employed by the tenant, seems to be liable to a penalty at the suit of the landlord, who has a right to the game.[a] [1]

396. *Tenant's right to estovers.*—The tenant (except a tenant at will), has an implied right to reasonable estovers, viz., (1.) House-bote or wood to build, repair, or burn in his house; (2.) Plough-bote and cart-bote, or wood to make and repair his instruments of husbandry, as ploughs, carts, etc.; and, (3.) Hay-bote or hedge bote, wood to repair hedges or fences.[b] He requires no leave or assignment of the lessor to take these from the land,[2] and in order to restrain him, there must be an express covenant to the contrary, as there usually is.[c]

Tenant's right to mines.—The tenant may dig and work for his own use all mines which are open, unless restrained by express words in the lease; but it is waste, if he open mines without express power.[d] And the landlord has no right to enter on the premises to open mines, unless he has reserved power in the lease to do so.[3]

397. *Emblements, straw and dung.*—If the lease is for a definite term of years, or from year to year, and there is no special agreement, and the tenant sow the ground, but the term ceases before the crop is ripe, he is not[4] entitled to the crop, for that is part of the

[a] 1 & 2 W. IV. c. 32, § 7, 30; *Spicer* v. *Barnard*, Q. B. 4 May 1859.
[b] Co. Litt. 122 *a*; 2 Bl. Com. 35.
[c] Fitz. N. B. 59 M.; 1 Inst. 41.
[d] 2 Bl. Com. 282; Co. Litt. 53; *Huntley* v. *Russell*, 13 Q. B. 572.

IN SCOTLAND.

[1] *Contra;* the tenant himself may kill rabbits without hindrance of the landlord, *Moncreiff* v. *Arnot*, 6 S. D. 530; but it seems, a stranger with the tenant's leave cannot do so, the privilege being personal. *Porter* v. *Stewart*, 30 Sc. Jur. 518; *Kennedy* v. *E. Selkirk*, Shaw's Just. C. 463. But see 2 & 3 W. IV. c. 68, § 1.

[2] *Contra;* the presumption is the reverse. All woods are impliedly reserved (*i. e.*, excepted) from the lease, Ersk. 2, 6, 22; Bell's Pr. § 1226. Hence the lands must be let expressly with woods to authorise the tenant to help himself in this way; M. 15252; but he is entitled to thinnings, twigs, etc. 2 Bell's Ill. 193.

[3] *Contra;* the mines are impliedly reserved (excepted), whether they have been opened or not; and the landlord is entitled to enter on the land and open mines, paying the tenant for any surface damages caused thereby. Ersk. 2, 6, 22. M. 15,253. M. 15,267.

[4] *Contra;* he is entitled, unless the lease expressly exclude his right; the principle being—*messis sementem sequitur.* Ersk. 2, 1, 26; 2 Bell's Ill. 213; *M. Tweeddale* v. *Murray*, 6 Bell's Ap. 125; *Alexander* v. *Gillon*, 9 D. B. M. 524.

soil, and belongs to the reversioner. But it is otherwise where the term ends on some uncertain event, and where the tenant is a tenant at will.[a] And if there is a custom of the district, it will prevail to give the tenant the average growing crop.[b]

So the custom of the district regulates the right of the tenant to straw, hay, or dung; and in general it requires express words to exclude the custom.[c] [1]

398. *Rent, at what time payable.*—Rent is generally made payable by four quarterly payments on the usual quarter days, viz., Lady Day, March 25; Midsummer Day, June 24; Michaelmas Day, September 29; and Christmas Day, 25th December. In such cases the quarter's rent is due at the end of each quarter.[2]

399. Where nothing is said as to the time of payment, the rent is payable once[3] a year, and nothing is due until the end of the year.[d]

400. *Rent in advance.*—Rent is sometimes made payable in advance; but if not expressly so made payable, it is only payable at the

[a] 2 Bl. Com. 145.
[b] *Wigglesworth* v. *Delahay*, 1 Doug. 201; *Beavan* v. *Delahay*, 1 H. Bl. 8.
[c] *Muncy* v. *Dennis*, 1 H. & N. 216.
[d] Latch. 266; *Turner* v. *Allday*, Tyr. & Gr. 819.

IN SCOTLAND.

[1] The common law regulates the respective rights and obligations of the parties in such a case. 1 Bell's Com. by Shaw, 893. A special stipulation in the lease will also overrule any local custom. *Gordon* v. *Robertson*, 2 W. S. 115; *Berry*, 3 W. S. 417. Where a landlord agrees to stock a farm, and the tenant to give up similar stock at the end of the term, this is called steelbow, and the right to manure depends on this principle. Bell's Pr. § 1264.

[2] Rent is generally made payable at two terms, being the legal terms, viz., Whitsunday, 15th May, and Martinmas, 11th November; Candlemas, 2d February, and Lammas, 1st August, are conventional terms frequently agreed upon.

[3] *Contra;* twice a year, viz., Whitsunday and Martinmas. But the first half year's rent is not due till the Whitsunday after entry, *i. e.*, at the end of one year, and the second half year's rent not till the Martinmas following, *i. e.*, a year and a half after entry. In the absence of express agreement, the rent is calculated from the time of entry; and the time of entry as to houses and grass is Whitsunday, and the time of entry to arable land is Martinmas.

expiration of each year,[1] half-year, or quarter-year, according to the nature of the tenancy.

401. *Premium given by lessee.*—A lease is often granted in consideration of an annual rent, and of a gross sum of money or premium paid in cash.[2] It is also common, in leases renewable by corporations, to stipulate for a fine or forehand rent payable on each renewal.[a]

402. *Rent, etc., in case of fire.*—In general, where the house or premises are burnt down by accidental fire, or destroyed by a storm or flood, the tenant is nevertheless bound[3] to pay rent, for the rent is said to issue out of the land, and to be due irrespective of the state of the buildings thereon.[b] He is bound to pay rent, if he expressly covenanted to pay rent, no exception being made as to non-liability in such an event.[c] And he is equally bound under a tenancy by written agreement not under seal.[d] The tenant can only protect himself by an express proviso for suspension of rent in case of the destruction of the premises.

A covenant on the part of the tenant to repair includes a covenant on his part to rebuild in the event of accidental fire.[e 4]

And where there is no contract on the part of the landlord to

[a] Woodfall, L. & T. 311 (7th ed.)
[b] *Arden* v. *Pullen*, 10 M. & W. 321.
[c] *Monk* v. *Cooper*, 2 Str. 736; *Weigall* v. *Waters*, 6 T. R. 488.
[d] *Baker* v. *Holtzapfel*, 4 Taunt. 45; *Izon* v. *Gorton*, 7 Sc. 537.
[e] *Bullock* v. *Domett*, 6 T. R. 650; *Digby* v. *Atkinson*, 4 Camp. 275.

IN SCOTLAND.

[1] *Contra;* rent, where nothing is said, is payable at Whitsunday 15th May, and Martinmas 11th November. But rent may be stipulated forehand (*i. e.*, payable in advance); or may be postponed, called backhand rent. In leases of farms the rent is frequently postponed until after the crop is gathered.

[2] The premium is called a grassum; and in deeds of entail the clause against alienation is held to strike at long leases made by the heir of entail in possession, part of the consideration for which is a grassum, as this may be made a means of prejudicing the substitute heirs of entail. See Queensberry Leases, 1 Bligh, 339; 5 Dow, 297; 2 Dow, 90; 2 Sh. Ap. 54; 2 W. S. 265; 4 W. S. 254.

[3] *Contra;* in all cases of accidental and complete destruction to the subject, whether by fire or storm, the liability for rent is extinguished. Ersk. 2, 6, 41; *Murdoch* v. *Fullerton*, 7 S. D. 404; 2 Bell's Ill. 181. See also next two notes.

[4] The same. *Clark* v. *Glasgow Ins. Co.*, 26 Sc. Jur. 841; 1 Macq. 668.

rebuild, the landlord is not bound to do so in the case of accidental fire.[a] And he may recover the rent from the tenant, even though he expressly covenanted to insure the premises, and has already received the insurance money.[b] In such cases it is difficult for a tenant to know how to protect himself;[1] but the better opinion seems to be, that he ought to tender an abandonment of the lease, if the landlord refuse or neglect to rebuild.[c]

403. *Set-off against rent.*—In general, no payments or damages made or sustained by the tenant can be set off against a claim of rent due to the landlord.[2] Thus a tenant cannot set up as a defence to an action for rent, that the landlord has not performed his covenants, his only remedy being an action for breach of such covenant, or, in some cases, a suit in equity for specific performance. But the tenant can, in an action for rent, set off sums paid as ground-rent,[d] and he is authorised by statute to set off payments for land-tax, property-tax, and when he has paid money to prevent his being ousted.[e]

404. *Security for future rent.*—Where a year's rent is in arrear, and there is in the lease no proviso of forfeiture for non-payment, it

[a] *Arden* v. *Pullen*, 10 M. & W. 321; Per L. Mansfield, *Pindar* v. *Ainslie*, 1 T. R. 312.

[b] *Loffts* v. *Dennis*, Q. B. 31 Jan. 1859.

[c] *Ibid.*

[d] *Doe* v. *Hare*, 2 Cr. & M. 145.

[e] Woodfall, L. & T. 336 (7th ed.)

IN SCOTLAND.

[1] *Contra;* the tenant is not liable to pay rent if the destruction is complete; but if partial and temporary, it seems he will continue liable *pro tanto*, and if no deduction of rent be allowed by the landlord, he may renounce the lease. M. 15,172. See 2 Bell's Ill. 182; *Sinclair* v. *Mossend Iron Co.*, 17 D. B. M. 258. If partial, but not temporary, he may renounce the lease. *Bayne* v. *Walker*, 3 Dow, 233; 6 Paton, 217. If the destruction is caused by a public calamity, it is said the landlord and tenant bear each a half of the loss, Ersk. 2, 6, 41; M. 10,120; but if caused by a change of the law, the whole risk is borne by the tenant. *Holliday* v. *Scott*, 8 S. D. 831.

[2] *Contra;* the tenant can retain the rent, provided his claim is liquid (*i. e.*, a liquidated sum), 2 Bell's Ill. 194, 204; *Sprott* v. *Morison*, 15 D. B. M. 376; *Dods* v. *Fortune*, 16 D. B. M. 478; *Lowndes* v. *Buchanan*, 17 D. B. M. 63. But this right is not valid against singular successors (*i. e.*, purchasers of the reversion). The tenant has also a defence in case of accidental fire. See *ante*, § 402 *n.*

is not competent for any court to compel the tenant to give security[1] for five years' rent, or any rent to become due afterwards.

405. *Action for rent not privileged.*—Where rent is due, and the landlord brings an action to recover the same, such action is not privileged or summary,[2] but proceeds by steps in the usual way from summons to judgment and execution.

406. *Landlord's power of distress.*—A landlord, over and above his remedy by action against the tenant for rent, has a summary remedy by distraining the tenant's goods.

407. *When distress may be levied.*—The right of distress can only be enforced after the rent is due; but where the rent is by the lease reserved payable in advance, then the rent is due at the commencement of the year or term. Thus, in a tenancy from year to year, where it is not agreed that the rent is to be paid quarterly or half-yearly, the rent is payable once a year, and the landlord cannot distrain until the end of the year. The distress cannot be made the same day on which the rent becomes due, for the rent is not due till the last minute of the natural day.[a] Before the distress is made, the goods of the tenant are in no way affected by the right of the landlord, and the tenant can sell or remove them without let or hindrance from the landlord any day before the last day on which the rent is due, *i.e.*, during the currency of the year, half-year, or quarter, as the case may be.[3]

[a] *Duppa* v. *Mayo*, 1 Saund. 287; 2 Salk. 578.

IN SCOTLAND.

[1] *Contra;* where a year's rent is due, the sheriff may compel payment, with caution, for the next five years' rent, and otherwise to remove. Act of Sed. 14th Dec. 1756; Bell's Pr. § 1250.

[2] *Contra;* all leases may contain a clause of registration for execution, and usually do so, and if the lease has been registered, diligence may be had without the necessity of any action, (*i.e.*, execution issues, as if the lease contained a warrant of attorney to confess judgment). Bell's Pr. § 1232.

[3] *Contra;* the hypothec (resembling a maritime lien in E., which subsists without possession), attaches upon the tenant's goods before the rent is due. The hypothec is made effectual by sequestration. But the goods being subject to the hypothec from the first day of the tenancy, the landlord can insist that the goods shall remain on the premises till the current rent is paid, at least enough of the goods to pay the full rent, or until security is given. Ersk. 2, 6, 56, *et seq.*; 2 Bell's Ill. 196; *Preston* v. *Gregor*, 7 D. B. M. 942. And in the case of corn grown on a farm, if

408. *What rent may be distrained for.*—The landlord may distrain the goods for rent due for any number of years not exceeding six, but he cannot distrain for the current year's rent until it has become due.[a] [1]

There is not only no power of distraining for rent current, and not yet due,[2] but there is no mode of compelling security from the tenant for the same.

409. *What goods may be distrained.*—The landlord may in general distrain all the goods and chattels upon the premises, whether they are the property of the tenant or a stranger.[3]

In the case of farms, the growing crops could not be distrained at common law;[4] but they can now be so by statute.[b]

[a] 3 & 4 W. IV. c. 27, § 42; *Humfrey* v. *Gery*, 7 C. B. 567; *Manning* v. *Phelps*, 10 Exch. 59.

[b] 2 W. III. c. 5, § 3, 11 Geo. II. c. 19; 56 Geo. III. c. 50, § 6.

IN SCOTLAND.

the rent is unpaid, the landlord can follow and recover the corn, even in the hands of *bona fide* purchasers, unless it has been sold in bulk in public market. *E. Dalhousie* v. *Dunlop*, 4 W. S. 420.

[1] *Contra.* Bell's Pr. § 1239. The rule is, that the hypothec extends to the crop for the rent of the year whereof it is the produce, and attaches on the crop so long as it is in the possession of the tenant. Bell's Com. by Shaw, 884; *Horn* v. *Maclean*, 8 S. D. 454; *M'Clymont* v. *Cathcart*, 10 D. B. M. 1489. And the sequestration of such crop may be obtained after the lapse of several years, seven years having been held not to be too long. *Hay* v. *Keith*, M. 6188 *et seq.* There is, however, no hypothec over the crop for the rent of any previous or subsequent year. Cattle, and stocking, and furniture, are subject to the hypothec for each year's rent successively; but the right expires, if not made effectual by sequestration, within three months after the last term for the payment of the rent. *Ibid*; *Dick* v. *Lands*, M. 6243; 2 Bell's Ill. 197; *Hunter* v. *North of England Bank*, 12 D. B. M. 65; Hunter's L. & T. 370 (2d ed.)

[2] *Contra;* though sequestration cannot be had, so as to sell the goods, before the rent is due, yet the landlord can get sequestration in security, *i. e.*, until the tenant find caution. Bell's Com. by Shaw, 885; 16 & 17 Vic. c. 80, § 27. And see *ante*, § 407 *n.*

[3] *Contra;* the hypothec of the landlord does not attach upon a stranger's goods (Bell's Pr. § 1276), except they consist of furniture hired or lent in town houses. The rule is, that the landlord's hypothec extends to all goods *invecta et illata*, with the exceptions just stated and in the notes following.

[4] This was so at common law. See *Brims* v. *Ferrier*, 31st May 1815, F. C.

In leases of land and farms, the household furniture[1] in the tenant's house can always be distrained, as well as anything else on the demised premises.

410. *Goods in use, apparel, etc.*—The property, it is said, must not be in actual use, for the distress might in that case lead to a breach of the peace. Thus a horse, on which the tenant is riding, cannot be taken,[a] nor the clothes off the tenant's back; but if the wearing apparel[2] is not actually in use, it can be distrained.[b]

So there is an exception in favour of the tools and utensils of trade,[3] and beasts of the plough[4] on a farm, which cannot be distrained, if there are other goods sufficient for a distress.[c]

411. *Goods of strangers.*—In the case of farms, the cattle of third parties, though put there by way of agisting, *i.e.*, to graze, or otherwise, may be distrained[5] by the landlord.[d] So cattle, which have strayed from other parts on to the tenant's lands, owing to the negligence of their owner, may be distrained by the tenant's landlord.[e] [6]

Hired furniture is liable to be distrained, as well as furniture lent to the tenant.[7]

[a] *Storey* v. *Robinson*, 6 T. R. 138; *Bunch* v. *Kennington*, 1 Q. B. 679.

[b] *Bisset* v. *Caldwell*, Peake 36; 1 Esp. 206.

[c] *Gorton* v. *Falkner*, 4 T. R. 565; *Wood* v. *Clarke*, 1 Cr. & J. 484; 51 Hen. III. st. 4; *Piggott* v. *Birtles*, 1 M. & W. 441; *Keen* v. *Priest*, 4 H. & N.

[d] Roll. Abr. 669; see 2 Wms. Saund. 290 *n* 7.

[e] Gilb. Distr. 45; *Park* v. *Longueville*, 2 Saund. 289.

IN SCOTLAND.

[1] It is said to be doubtful, whether the furniture of a tenant of a farm is subject to the hypothec. M. 6205; Goldie, 1 D. B. M. 426; Hunter, L. & T. 355; 2 Bell's Ill. 195; *M'Clymont* v. *Cathcart*, 10 D. B. M. 1489.

[2] This is said to be doubtful. More's Stair, notes 83; M. 6243, 4.

[3] This is said to be doubtful. *Callendar* v. *Campbell*, M. 6244; Hunter, L. & T., 352, 364; 2 Bell's Ill. 195.

[4] Horses used in husbandry seem to be liable to be taken. *Napier* v. *Kissock*, 4 S. D. 307; *Hunter* v. *N. England Bank*, 12 D. B. M. 65; but see *Henderson* v. *Dunbar*, 17 Sc. Jur. 271.

[5] *Contra;* the hypothec does not extend over the cattle of others put into the fields to graze. *Brown* v. *Sinclair*, M. 6205; see *ante*, § 409 *n*.

[6] *Contra.* See last note, and *ante*, § 409 *n*, as to the general rule.

[7] The hypothec extends to hired furniture and to furniture on gratuitous loan. *Stewart* v. Bell, 18 F. C. Apx.; *Wilson* v. *Spankie*, 17th Dec. 1813, F. C.; *Pearson* v. *Robertson*, 6th June 1822, F. C. But it seems otherwise, if the furniture lent or deposited is detained against the owner's will. *Cowan* v. *Perry*, 2 Bell's Ill. 215; *Jeffrey* v. *Carrick*, 15 S. D. 43.

But though the goods of third parties in general may be distrained, there is an exception in favour of trade,[1] as where materials have been sent for a specific temporary purpose, to be worked upon in the way of trade, as to a tailor's, weaver's, etc.[a] So goods of a principal in the hands of his factor for sale,[b] or in the hands of an auctioneer.[c]

So the goods of a guest at an inn, provided he is a temporary guest, and not an undertenant, are privileged from a distress by the landlord of the innkeeper.[d 2] And horses and carriages standing at livery[3] may be distrained.[e]

412. *Landlord preferred to execution creditor.*—Where the goods of a tenant are taken in execution by a creditor, the landlord is entitled to be first paid for one year's rent, if already due, but no more, before the proceeds of the goods sold are paid over by the sheriff to the creditor.[f 4] Hence if several years' rent is due, the landlord must proceed for all except one year's rent, like an ordinary creditor, and has no preference over the execution creditor, but is postponed to him *quoad* all the goods seized by the sheriff in execution.[5] But where the tenancy is weekly, the landlord is only entitled to four weeks' rent out of the proceeds of the execution; and if the tenancy is for any other term less than a year, then the landlord's preferable claim is not to exceed the arrears for four such terms; or if the execution is from a county court, two such terms, the whole not

[a] *Gibson* v. *Ireson*, 3 Q. B. 39; *Parsons* v. *Gingall*, 4 C. B. 545.
[b] *Gilman* v. *Elton*, 2 B. & B. 75.
[c] *Brown* v. *Arundell*, 10 C. B. 54; *Williams* v. *Holmes*, 8 Exch. 861.
[d] *Crosier* v. *Tompkinson*, 2 Ld. Ken. 439.
[e] *Francis* v. *Wyatt*, 1 W. Bl. 483; *Parsons* v. *Gingall*, 4 C. B. 545.
[f] 8 Anne, c. 14; 13 & 14 Vic. c. 61, § 107.

IN SCOTLAND.

[1] The same; though not as an exception to a general rule. See previous notes. Ersk. 2, 6, 64; Bell's Com. by Shaw, 883.

[2] The effects of travellers in an inn are not subject to the hypothec of the innkeeper's landlord, whether he is a temporary guest or not. Bell's Com. by Shaw, 883.

[3] *Contra.* Bell's Com. by Shaw, 166.

[4] So the landlord is entitled to this preference for the time the hypothec exists, which is only for one year in general. See *ante*, § 408 *n.*

[5] No such restriction exists, but see last note.

exceeding the rent for one year.[a] The landlord is also entitled to distrain on a bankrupt's estate for one year's rent.[b]

413. *Removal of goods to avoid distress.*—The landlord's power to distrain is lost by the removal of the goods from the premises, and the goods can always be removed before the day on which the rent becomes due.[1] But if they have been removed fraudulently to avoid a distress for rent which has become already due, the landlord may within thirty days follow them, and seize the same wherever found, unless they are in the hands of a *bona fide* purchaser without notice of the fraud.[c 2] And if the goods have been so fraudulently removed on, but not before the day, on which the rent became due, the goods may be followed.[d]

414. *What debts to be first paid out of distress.*—Where a landlord has distrained the goods of a deceased tenant, he is not bound to pay out of the proceeds the claim of the medical attendant, nor the funeral expenses[3] of such tenant.

Nor in any case is he bound to pay the wages of any servant[4] of such deceased tenant.

Nor is the landlord bound to pay out of the proceeds of the distress any rent due to the lord of the manor or lord of the fee, if any.[5]

415. *The distress, how made.*—The distress is made by the

[a] 7 & 8 Vic. c. 96, § 67; 9 & 10 Vic. c. 95, § 107.
[b] 12 & 13 Vic. c. 106, § 129.
[c] 11 Geo. II. c. 19, § 1, 2, 7.
[d] *Dibble* v. *Bowater*, 2 E. & B. 564.

IN SCOTLAND.

[1] *Contra;* the crop of a farm cannot be removed, if the rent is unpaid; if sold, the sale is void, unless the crop was sold in bulk in public market. Bell's Pr. § 1242; *Dunlop* v. *E. Dalhousie*, 4 W. S. 420.

[2] The goods can be followed not only where the rent of the current year is due, but before it is due. See *ante*, § 407 *n.*

[3] *Contra.* These are called death-bed and funeral expenses, and are privileged. Bell's Pr. § 1241; *Drysdale* v. *Kennedy*, 14 S. D. 159; Ersk. 2, 6, 60.

[4] *Contra;* farm servants, but not other servants, have a preference for the current term's or year's wages. Bell's Pr. § 1251; Ersk. 3, 9, 43; *Marshall* v. *Philp*, 6 S. D. 515.

[5] *Contra.* The superior's feu-duties, being the subject of the superior's hypothec, are preferred to the landlord's rent. Ersk. 2, 6, 63; *Laurie* v. *Yuille*, 2 S. D. 155.

landlord in person or more usually by his bailiff, either of whom seizes part of the goods, declaring this to be done in name of the whole. There must be a clear intention expressed on the part of the landlord in such cases to constitute a distress. After seizure has been made, the landlord or his bailiff must make an inventory of as many goods as are deemed sufficient to cover the rent in arrear, and charges. After inventory, a notice in writing must be served on the tenant, stating what has been done, accompanied with a copy of the inventory. The goods are then generally removed, and the notice must inform the tenant where the goods are removed to. The notice also states that, if the rent in arrear is not paid in five days, the goods will be appraised and sold. Two sworn appraisers then value the goods, and may sell them either by private or public sale.[a] [1] During the five days the tenant may replevy the goods, if he dispute the validity of the seizure, *i.e.*, he may bring an action of replevin, and on giving security the goods are re-delivered to him, on pledge to restore them if the action go against him.

When a bailiff is appointed by the landlord to effect the distress, he is appointed by a writing, called a warrant of distress, and though any person in general may be a bailiff[2] for that purpose, brokers are generally employed, whose charges are restricted, in the case of small rents not exceeding £20, by the statute 57 Geo. III. c. 93. If the goods are left on the premises, the broker leaves a man in possession to take charge of them.

416. The landlord cannot make the distress in the night, that is, after sunset and before sunrise.[b] Before he makes a distress, he does not require to apply to any judge or court for a warrant

[a] 2 W. III. sess. 1, c. 5, § 2; 11 Geo. II. c. 19, § 9. [b] Gilb. Distr. 56.

IN SCOTLAND.

[1] *Contra;* the sequestration is under the authority of the Sheriff, and consists, in the first instance, in a summary application by the landlord to the sheriff, who pronounces an interlocutor sequestrating the crop, stocking, or effects, and grants warrant to the officer to take an inventory, which is served on the tenant, and afterwards a warrant to sell is obtained, and a report must be made within fourteen days as to the proceeds realized, and giving an account of the expenses incurred. 1 Vic. c. 41; Act of Sed. 11th July 1839; 16 & 17 Vic. c. 80, § 27.

[2] This duty is done by the officer of the Sheriff Court. See last note.

to enable him to seize and sell the goods; but can seize them or appoint a bailiff to seize them *brevi manu*.[1]

The landlord or his bailiff cannot break open the outer door of the tenant's house in order to make the distress; and no court has power to authorise him to break the outer door.[2] But he may turn the key or lift the latch of the door as other persons do on entering.[a] And a stratagem to procure peaceable admission is quite legal and common.

417. *Distress of cattle.*—Where a distress was made upon cattle, they used to be put in a pound overt, to which the owner, at whose risk they were, might go and feed them; but if they were put in a pound covert, *i.e.* private, the distrainer was bound to feed them. Now in all cases the distrainer is bound to provide the cattle with food and water, or any person may do so at the expense of the owner.[b 3] And the distrainer must put the cattle in a pound within the county, not more than three miles distant, or he may impound them on the premises.[c]

418. *Distraining on sub-lessee.*—Where the tenant or lessee has sub-let the premises, the paramount landlord has the same power to distrain all goods on the premises, whether belonging to his own tenant or the sub-tenant, as if there had been no sub-lease made: and though there was power in the tenant to sub-let, and though the sub-lessee has paid all his rent to the mesne landlord, this is no protection[4] against the distress of the paramount landlord, unless the latter agreed not to distrain the goods.[d]

[a] *Ryan* v. *Shilcock*, 7 Exch. 72.
[b] 12 & 13 Vic. c. 92, § 5.
[c] 1 & 2 Ph. & M. c. 12; 11 Geo. II. c. 19.
[d] *Welsh* v. *Rose*, 6 Bing. 638.

IN SCOTLAND.

[1] *Contra;* the landlord cannot seize the goods *brevi manu*, but the Sheriff, who is the judge ordinary, must grant warrant of sequestration, after due application by petition. Bell's Pr. § 1245; *Miller* v. *Paterson*, 9 S. D. 792; 16 & 17 Vic. c. 80, § 27; see *ante*, § 415 *n.*

[2] The officer of the court executes the warrant, and the court has power to authorise the outer door and lockfast places to be broken open if necessary. See *Scott* v. *Letham*, 5 Bell's Ap. 126.

[3] The practice of impounding is unnecessary and incompetent. See *ante*, § 415 *n.*

[4] *Contra;* the landlord's hypothec only extends to the sub-tenant's goods, where there is no power to sub-let, and the landlord has not acknowledged the sub-tenant; *L. Saltoun* v. *Club*, M. 1821; but in other

So the sub-lessee of part of the premises may be distrained upon for the entire ground rent, unless the rent has been apportioned; and he may often have no remedy against the co-sub-lessees of the other parts, though he has paid off the distress and thereby the whole of the ground rent.[a] [1]

Where a tenant is entitled to sub-let, he has the same powers of distress over his sub-tenant as his own landlord has over himself.[2]

419. *Liability of sub-lessees and assignees.*—An assignment as contra-distinguished from an under-lease parts with the whole term.[3] Hence if the lessee of a term, say of twenty-one years, lets the land for the whole term, though expressly reserving rent, and a power of re-entry for non-payment, to himself and not to the original lessor, this being, it seems, substantially an assignment, the assignee can sue the original lessor on the covenants of the lease.[b] In such circumstances, however, if the land had been let to the sub-lessee for twenty-one years wanting one day, it would have been a sub-lease.

There is a privity of estate between the lessor and the sub-lessee, but no privity of contract, unless the covenant is such as to run with the land. Where the lessee assigns his estate, then there is a privity of estate between the lessor and the assignee, but no privity of contract, except as regards covenants running with the land.

The lessee always[4] continues liable on his express covenants,

[a] *Hunter* v. *Hunt*, 1 C. B. 300.

[b] *Palmer* v. *Edwards*, 1 Doug. 187; but see *Pollock* v. *Stacey*, 9 Q. B. 1033.

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cases the hypothec does not affect the sub-tenant's goods, provided the sub-tenant has paid his rent to the tenant, his own immediate landlord. *Blane* v. *Morrison*, M. 6232; Bell's Pr. § 1237; *Bannatyne* v. *Findlay*, 2 S. D. 62.

[1] This is doubtful. Hunter, L. & T. 399; M. 1821; Bell's Com. by Shaw, 881.

[2] It seems the same. 2 Bell's Ill. 196; *Bannatyne* v. *Findlay*, 2 S. D. 62; *Stevenson* v. *Cooper*, 1 S. D. 288.

[3] *Contra*; the lessee may, if otherwise entitled, sub-let the land for the entire term, without making the sub-lessee an assignee.

[4] It is said the landlord accepts the assignee and passes from all claim against the cedent or lessee. Bell's Com. by Shaw, 897. But as a vassal or ground annualer is bound for ever by his express covenant though he has parted with the property (*Miller* v. *Small*, 25 Sc. Jur. 334; 1 Macq.

though he has long ceased to hold possession, and has parted with his whole estate to an assignee who is in possession.[a]

The assignee is bound, only from the date of the assignment, by the covenants which run with the land, such as the covenant to pay rent, to repair, etc., and ceases to be bound as to acts arising after he has assigned to another party.[b] Hence the assignee often re-assigns the premises to a beggar or a man of straw, to get quit of his liability on the covenants; and this conduct is, in the absence of fraud, quite justifiable.[c]

420. *Notice to quit.*—In order to put an end to a lease which was granted or made for a determinate number of years, it is not[1] necessary for the landlord to give any notice to quit. The landlord is entitled to full and complete possession immediately upon the determination of such tenancy.

421. *Tenant holding over.*—If the tenant hold over, he may be treated by the landlord as a tenant from year to year on the terms of the lease so far as applicable; but no implied new yearly tenancy is created[2] by the mere fact of the landlord not bringing an ejectment. Where it was the tenant who gave a valid notice to quit, and does not quit, but holds over, he becomes liable for double rent.[d 3]

[a] 2 Platt on Leases, 352; but it is otherwise as to an implied covenant to pay rent, *Ibid*, 355.

[b] Woodfall, L. & T. 216.

[c] *Rowley* v. *Adams*, 4 My. & Cr. 534.

[d] 11 Geo. II. c. 19, § 18.

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345; *Elmslie* v. *Brown*, 27 Sc. Jur. 346; 2 Macq. 40), there seems to be no reason, why a lessee should not also be bound on his express obligation, though he has assigned the premises and ceased to be in possession. This was the doctrine of Ersk. 2, 6, 34, and Bank. 2, 9, 14, though the court has departed from it. *Skene* v. *Greenhill*, 4 S. D. 26; *Laing* v. *Duff*, 7 D. B. M. 556.

[1] *Contra;* one or other party must give warning (Bell's Pr. § 1265; Ersk. 2, 6, 35; 2 Bell's Ill. 211), unless there is a clause dispensing with warning. *Mackintyre* v. *Macnab*, 8 S. D. 237; 5 W. S. 299; Hunter, L. & T. 30. See next note, as to the effect of not giving warning.

[2] This is the common law, the doctrine of tacit relocation being that the parties impliedly renew their agreement for another year, and so on from year to year till notice should be duly given. This is the rule, whether the lease was for a term certain or not. Ersk. 2, 6, 35; Bell's Pr. § 1265; Hunter, L. & T. 523; 2 Bell's Ill. 211; *Macintyre* v. *Macnab*, 5 W. S. 299. But there is no tacit relocation in a lease of pasture fields. *Chirnside* v. *Park*, 5 D. B. M. 864.

[3] *Contra.* See last note.

So where, after due notice given by the landlord, the tenant or any one colluding with him wilfully holds over after the determination of the tenancy, the landlord may at any time afterwards, a demand in writing for possession having been previously served, render the tenant liable for double [1] the yearly value of the lands till delivered.[a]

423. *Notice to quit in yearly tenancies.*—A notice to quit is unnecessary, where the tenancy is for a term certain; but is always necessary in a tenancy from year to year, and it seems also in a tenancy from quarter to quarter, month to month, week to week, etc.[b] And even in tenancies for a term certain, where a landlord is bound to repair and refuses to do so, the tenant can only get quit of his tenancy by giving a notice to quit.[c] Where a tenant takes a farm or house as yearly tenant, and no day is fixed at which the tenancy commences, the year is counted from the day on which he enters; [2] and if he enters on different parts of the premises at different times, the time is calculated from the entry to the principal subject of the demise.[d]

424. Either party, unless it is expressly agreed to the contrary, must give the other half a year's notice to quit, such notice expiring at the same day of the year as that on which the tenancy commenced.[e] [3] But it is usual in agreements to reckon the time of

[a] 4 Geo. II. c. 28, § 1.
[b] *Towne* v. *Campbell*, 3 C. B. 921.
[c] *Arden* v. *Pullen*, 10 M. & W. 321; *Hart* v. *Windsor*, 12 M. & W. 68.
[d] *Doe* v. *Howard*, 11 East, 498; *Doe* v. *Hughes*, 7 M. & W. 139; *Doe* v. *Rhodes*, 11 M. & W. 600.
[e] *Right* v. *Darby*, 1 T. R. 169; *Gulliver* v. *Burr*, 1 W. Bl. 596; *Doe* v. *Grafton*, 18 Q. B. 496.

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[1] *Contra.* There is no such rule.

[2] *Contra*; the time of entry, in the absence of special agreement, is counted from next Whitsunday, 15th May, as regards grass and houses; and from Martinmas, 11th November, as regards arable land. *Bett* v. *Murray*, 7 D. B. M. 447.

[3] *Contra*; the warning is forty days before Whitsunday or Martinmas as to grass or arable farms respectively; as to houses in towns and cities, forty days before the time for removal; or it is regulated by local custom. In Edinburgh the custom is to give warning at Candlemas, *i.e.* a three months' notice; yet, it seems, a shorter warning would suffice. Bell's Pr. § 1278; 2 Bell's Ill. 218; Bell's Com. by Shaw. 890. But now, in all cases where a probative lease specifies a term of endurance, forty days' notice before the expiration of such term will authorise a removing, provided the removal or ejectment is effected within six weeks after the term has expired. 16 & 17 Vic. c. 80, § 29.

entry from one or other of the usual quarter days, viz., Lady Day, Midsummer Day, Michaelmas Day, or Christmas Day. Notice to quit may be waived by the landlord accepting rent afterwards, or giving a second notice, etc.

425. *Action of ejectment.*—In cases where the rent does not exceed £50, the action of ejectment may be brought in the County Court; but in all other cases in the Superior Courts of Law.[1] The action cannot be commenced before the term has expired.[2] The services of John Doe and Richard Roe are not now necessary in this form of action.[a] It is distinguished from other actions by having no pleadings, the service of the writ, calling on the defendant to appear and defend, being sufficient. The appropriate writ of execution, under which the sheriff gives entry to the plaintiff after judgment, is a writ of *habere facias.*

426. *Proviso for re-entry.*—Non-payment of rent is not an implied forfeiture[3] of the lease, nor is it a ground for bringing an ejectment, unless there is an express proviso to that effect, usually called a proviso for re-entry. Where there is such a proviso, whether for non-payment of rent, breach of covenant, or other matter, the lessor has the option of determining the lease or not; and he may waive the forfeiture by receiving rent after the breach, etc.[b]

[a] 15 & 16 Vic. c. 76.

[b] *Reid* v. *Parsons*, 2 Chit. 247; *Doe d. Green* v. *Baker*, 8 Taunt. 241; *Croft* v. *Lumley*, 6 H. L. Cas. 672.

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[1] *Contra;* the action of removing may be, in all cases, in the sheriff, or local court. Bell's Pr. § 1268. It is competent to raise the summons of removing at any time not exceeding forty days before the term of removal. 16 & 17 Vic. c. 80, § 29. The removal is effected under a precept of ejection from the sheriff, or warrant to remove.

[2] *Contra.* Bell's Pr. § 1267, 1268. See last note.

[3] Where one year's rent is in arrear, if no caution be given for future rent, an action of removing is competent. Ersk. 2, 6, 44; Act of Sederunt, 14th Dec. 1756; Bell's Pr. § 1251.

PART II.

PERSONAL PROPERTY.

CHAPTER I. CONTRACTS GENERALLY.

II. TORTS.

III. SALE OF GOODS.

IV. BILLS OF EXCHANGE.

V. SHIPPING—INSURANCE—COPYRIGHT.

VI. LIEN—PLEDGE—DEPOSIT—BAILMENT.

VII. PRINCIPAL AND AGENT.

VIII. GUARANTEE.

IX. JOINT ESTATES AND DEBTS—PARTNERSHIP—CORPORATIONS—JOINT STOCK COMPANIES.

CHAPTER I.

CONTRACTS GENERALLY.

431. *Meaning of terms.*—A contract[1] is the most extensive term used to denote every kind of agreement, obligation, or legal tie whereby one party voluntarily binds himself to another, expressly or impliedly, to pay money, or to do or abstain from doing anything. "Obligation" is a word used by the older writers as synonymous with bond. "Promise" is generally used to import an engagement, express or implied, to do something, without respect to its consideration. The word "agreement" has no definite meaning, except as synonymous with contract, but it is frequently used to mean a simple contract as distinguished from a contract under seal, or a covenant.[2] "Express contract" means a contract of which the terms are expressly stated and agreed upon, as distinguished from "implied contract," where the terms are implied at common law. Duties of imperfect obligation, such as the obligation of a parent to maintain a child, are those which cannot be enforced by a court, either of law or equity.[3]

432. *Division of contracts.*—The leading division of contracts is

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[1] The corresponding term is obligation, which, however, is a wider term, and comprehends more than a contract. Thus the obligation of parents to support children does not arise from any implied contract, but is said to be *ex lege*. Contract is generally used to denote mutual obligations. Obligations are generally divided into express or conventional and implied or obediential. Express obligations are said to be those which may be judicially enforced. Implied obligations may or may not be capable of being enforced.

[2] Stipulations correspond generally to covenants or special agreements, but the term is often used vaguely.

[3] *Contra;* these obligations can in some cases be enforced; thus actions of aliment can be maintained by a child againt the parent (*Maule* v. *Maule*, 1 W. S. 266; *Maidment* v. *Maidment*, 6 Dow, 257), and by a parent against the child. Ersk. 1, 6, 57; Bell's Pr. § 1634.

into contracts of record, contracts by deed or specialty, or under seal, and simple contracts or contracts not under seal.[1]

Contracts of record.—Contracts of record are those which are constituted by judgments of a court, by statutes merchant and statutes staple, the two latter being now in disuse.[a] Judgments when registered bind the real estate of the party, against whom they are given.[b] [2]

433. *Contracts by specialty.*—Contracts under seal or specialties, such as bonds and deeds, are constituted by writings sealed [3] and delivered by the parties.[c]

434. *Simple contracts.*—Simple contracts, or contracts not under seal, are either verbal or in writing, which writing may be signed, but not sealed, by the parties. The distinction is not between verbal and written contracts, but only between contracts under seal, and not under seal;[4] for a contract by writing not under seal, as a bill of exchange, is only an agreement by parol.

435. *Simple contracts, as distinguished from contracts under seal.*—The chief characteristic of a contract under seal is, that no consideration is necessary to give it validity.[5] The deed is binding upon

[a] See as to these, *ante*, § 130.
[b] 1 & 2 Vic. c. 110. See *ante*, § 134.
[c] As to the formalities of deeds see *ante*, § 335 *et seq.*

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[1] There is no such division, debts having no priority in respect of their being constituted by deed; yet there are some debts called privileged, which have priority on another ground, as to which see *post*, "Succession," "Bankruptcy."

[2] *Contra;* there must be a further process, ending with a decree of adjudication, but the latter can be had without any preliminary action, if the debt is liquid, *i. e.*, constituted by bond, bill, or other obligation in writing; and the decree is of itself an actual conveyance to the execution creditor. There are, moreover, remedies by inhibition and adjudication in security, which operate upon heritable property before decree in an action is obtained.

[3] A seal is not required to any deed. See *ante*, § 336 *n.*

[4] *Contra;* there being no seal, the distinction is chiefly between contracts in writing and verbal contracts.

[5] *Contra;* all contracts or obligations are valid without a consideration, whether constituted by deed or not by deed. They cannot, in general, be impeached on the ground of no onerous consideration being proved. In impeaching a gratuitous obligation, it must either be brought within the Statute 1621, c. 18, by which gratuitous grants or bonds to conjunct and confident persons are challengeable by prior creditors, or the bond must be shewn to be collusive and fraudulent at common law. Bell's Com. by Shaw, 43.

the grantor, both in law and in equity, though he received no consideration.[a] Nevertheless, a court of equity will not in general decree specific performance of a contract by deed, which is entirely without consideration.[b]

436. *Estoppel.*—Another characteristic of a deed is, that by the doctrine of estoppel, the party cannot in courts of law prove by parol or other evidence, that an admission or statement in the deed was mistaken or untrue, except in cases of fraud, duress, and illegality,[c] [1] whereas in writings not under seal and verbal contracts, the party is not estopped or concluded by admissions, unless the other party has been induced thereby to alter his condition.[d] In the latter case the admission or conduct is called an estoppel in pais.

437. *Merger.*—As a deed is a security of a higher nature, it operates as an extinguishment or merger of a simple contract. Thus, if a bill of exchange is given for a debt, and afterwards a bond is given for the same debt, the contract by bill merges in the contract by bond as between the two parties, *ipso facto*, whether the parties wish it or not; and the bill can be no longer enforced.[e] [2] And in the same way a debt by deed or bond will be merged in a judgment of the court when obtained, for a judgment is a higher degree of security. *f*

438. *Remedy for specialty debts.*—In the administration of the

[a] Per Abbott, *C. J. Irons* v. *Smallpiece*, 2 B. & Ald. 551; *Pratt* v. *Barber*, 4 Russ. 507; 2 Bl. Com. 446.

[b] 1 Fonbl. Eq. 151 *n.*

[c] 2 Bl. Com. 295; *Carpenter* v. *Buller*, 8 M. & W. 209; *Bowman* v. *Taylor*, 2 A. & E. 278; *Cutler* v. *Bower*, 11 Q. B. 973; *Wiles* v. *Woodward*, 5 Exch. 557.

[d] *Heane* v. *Rogers*, 9 B. & C. 577; *Freeman* v. *Cooke*, 2 Exch. 654.

[e] *Price* v. *Moulton*, 10 C. B. 561.

[f] *King* v. *Hoare*, 13 M. & W. 494.

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[1] The doctrine is unknown as between deeds and no deeds, but there is a doctrine which is more extensive, that a writ can only be taken off by another writ. This rule distinguishes all writings, whether by deed or not, from mere verbal contracts.

[2] *Contra;* novation, which is the extinguishment of a debt by the substitution of a new contract or obligation, is not presumed in such a case. The new security, whether by deed or not, must be expressly taken in satisfaction, otherwise it is deemed only a corroborative security. Conduct, such as cancelling the old security, or delivering it up at the time the new security is given, is equivalent to express words. Ersk. 3, 4, 22; M. 11,518.; *Cox* v. *Tait*, 5 D. B. M. 1283; *Campbell* v. *Cruikshank*, 7 D. B. M. 548; *Roy* v. *Stalker*, 12 D. B. M. 722.

assets of a deceased debtor, debts constituted by specialty are entitled to be paid in preference [1] to those constituted by simple contract.[a] But this priority does not obtain where the assets are equitable assets, nor where a court of bankruptcy distributes the estate. If by the deed the heirs of the party are expressly bound, an action may be brought against the heirs and devisees as well as the executors of the deceased debtor.

439. So a different period of limitation applies to actions brought to recover debts created by deed under seal; the action may be brought within twenty years,[2] whereas actions on debts by simple contract must in general be brought within six years. [b]

440. But debts created by specialty have no privilege [3] over debts created by simple contract as to the remedy by action, which must in both cases commence with a writ of summons, and proceed by the usual steps to judgment and execution. There is, on the contrary, a privilege in that respect conferred on actions on bills of exchange, which are simple contract debts, if such actions are brought in a certain form.[c]

It is necessary in all cases, except where the deed is thirty years old, and comes from the proper custody, when a party relies on a deed, to prove affirmatively that it is genuine, by producing the witness who saw its execution, or if he is dead, by proving his handwriting.[4]

441. *Consideration in contracts.*—A simple contract (*i. e.*, one not constituted by writing under seal or by record) furnishes no ground of

[a] See *post*, "Succession." [b] See *post*, "Limitation."
[c] See *post*, "Bills of Exchange."

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[1] *Contra.* See *post*, "Succession," and *ante*, § 432 *n.*

[2] *Contra;* there is no distinction, as regards the period of prescription, between debts secured by deed and debts not so secured, merely on that ground; but see *post*, § 489 *n.*

[3] *Contra;* there is a distinction. In bonds and other deeds securing liquid debts, containing a clause of registration, and on bills of exchange, diligence is summary (*i. e.* judgment can be signed, and execution can be had at once, without any action).

[4] *Contra;* all deeds, if *ex facie* regularly attested, prove themselves, and no witness need be called. See *ante*, § 353 *n.* As to holograph deeds, see *ante*, § 351 *n.*

action, unless there is some valid legal consideration for the contract, some *quid pro quo*, the maxim being—*ex nudo pacto non oritur actio.* What amounts to a legal consideration, however, is a question liberally dealt with, and generally it is held that the promisor must either obtain some kind of advantage, or the promisee suffer some loss, injury, or inconvenience in respect of the promise.[a] [1] Mere love, affection, friendship, or a sense of moral duty, is not a legal consideration in this sense.[b] Nor is the consideration good if it has been already executed, *i.e.*, in respect of something already done, unless it was so done at the express or implied request of the promisor.[c] In many cases, however, the law implies a promise, and these are generally known as implied contracts and promises. Thus, if a person orders goods, a contract to pay a reasonable price is implied. So where a sum of money is lent, the debtor is held impliedly to promise to repay it.

In bills of exchange and promissory-notes, a consideration is presumed, but in certain cases this presumption may be rebutted.[d] [2]

In contracts under seal a consideration is not necessary.[e]

442. *Statute of Frauds.*—There is no division of contracts as regards the mode by which they are proved, but some contracts and promises require to be by deed or in writing by the Statute of Frauds and other statutes.[3]

[a] 2 Bl. Com. 444; *Thomas* v. *Thomas*, 2 Q. B. 851; *Irons* v. *Smallpiece*, 2 B. & Ald. 551; 2 Wms. Saund. 137 *e*.

[b] *Harford* v. *Gardiner*, 2 Leon. 30; *Wennall* v. *Adney*, 3 B. & P. 249.

[c] *Jeremy* v. *Goochman*, Cro. Eliz. 442; *Raikes* v. *Todd*, 8 A. & E. 856; *Eastwood* v. *Kenyon*, 11 A. & E. 451.

[d] See *post*, "Bills."

[e] See *ante*, § 435.

IN SCOTLAND.

[1] *Contra*; a consideration is not necessary to a contract either by deed or not by deed, and none requires to be proved, unless a consideration is part of the contract. See *ante*, § 435*n*.

[2] The same, with qualifications stated *post*, § 550-3.

[3] The corresponding division of contracts is into consensual, real, and written. Consensual contracts are those which require mutual consent, and nothing more, to make them binding; such are sale, barter, location, mandate, partnership, which may be proved by writing, or witnesses, or oath of party. Real contracts are those which are not binding without actual possession, as loan, commodate, deposit, pledge; but consent alone may warrant implement. Written contracts are those to which writing is essential as a solemnity. Bell's Pr. § 15-18.

Where there is no valid writing within the Statute of Frauds, there is no remedy on the contract in a court of law; but if there has been part performance, and the contract is fair and clear, a court of equity will generally grant specific performance.[1]

443. *Contracts as to real property.*—Any interest in or concerning land or real property must, subject to some exceptions, be created and assigned by deed or writing.[a] [2]

444. *Other contracts.*—Some mercantile and other contracts require by statute to be in writing, as to which, see the special heads of sale, guarantee, infant, marriage, executor, etc.

445. *Contracts not to be performed within a year.*—By the Statute of Frauds an executory contract, which is not to be performed within one year from its date, must be in writing;[3] as a contract to become a subscriber to a work issuing in numbers which will not be concluded in a year, a contract to serve as clerk, etc.[b]

446. *Consideration must be in writing.*—In certain cases, where the Statute of Frauds requires the agreement to be in writing, viz., in contracts of sale of land and interests in land, in promises by executors, promises in consideration of marriage, and in contracts not to be performed within a year, the consideration, which is part of the agreement, must also be in writing.[4] Hence parol evidence of the consideration will not be allowed to be given in such cases.[c] In cases of guarantee, the mere circumstance of the consideration not appearing *ex facie* of the writing, or by necessary inference therefrom, will not now defeat the action.[d]

[a] Stat. Frauds, 29 Ch. II. c. 3, § 1-4. See *ante*, § 123 *et seq.*

[b] 29 Ch. II. c. 3, § 4; *Boydell* v. *Drummond*, 11 East, 142; *Giraud* v. *Richmond*, 2 C. B. 835.

[c] *Wain* v. *Warlters*, 5 East 10; 2 Smith L. C. 147; *Lockett* v. *Nicklin*, 2 Exch. 93; *Eden* v. *Blake*, 13 M. & W. 614.

[d] 19 & 20 Vic. c. 97, § 3. See *post*, "Guarantee."

IN SCOTLAND.

[1] There being no division of courts into courts of law and courts of equity, a similar effect, but extending wider, is produced by the court holding that an imperfect writing cannot be taken advantage of, if there has been *rei interventus* (part performance), or homologation (conduct amounting to estoppel, acquiescence, or confirmation). Bell's Pr. § 26, 27.

[2] The same by common law. Stair, 1, 10, 9; Ersk. 3, 2, 2.

[3] *Contra;* no contract requires to be in writing merely on this ground.

[4] *Contra;* as no consideration is necessary to the contract, so none need appear in the writing.

447. *Proof of mercantile letters, writings, etc.*—Letters and documents used by mercantile persons in the way of commerce are not privileged over other writings as regards their efficacy or mode of proof, and none are held genuine on mere production without proof of handwriting, nor held conclusive against other parol evidence. It lies on the party producing them, in all cases, to prove affirmatively[1] that they are genuine.

448. *Bond to pay money.*—A bond to pay £1000 is in this form:—"Know all men that I (A) am bound to B in the sum of £2000, to be paid to B, to which payment I bind myself. Sealed with my seal, etc. Now the condition of the above obligation is such, that if A pays to B the sum of £1000 and interest on (a certain day), then the above obligation to be void, otherwise to remain in full force."[2] The sum stated is in practice always double of the sum really secured. In an action brought on such bonds, judgment was at common law recoverable for the full or double sum; but by statute, if the money and interest really due are paid before or during action, it is a complete defence.[a] And so, when a bond is given to secure performance of a contract, no larger sum can in general be recovered than the damages actually sustained, which damages are assessed by a jury.[b]

[a] 4 Anne, c. 16. [b] 8 & 9 W. III. c. 11.

IN SCOTLAND.

[1] All documents in *re mercatoria* are held to be privileged to this extent, that if they are signed, though not written by the party, they are held, on mere production, and proof of handwriting to be genuine, and to prove their date, if any is stated, and they are not generally redarguable, except by writ or oath; whereas other writings are not on the same footing, unless they are deeds. What is a writ *in re mercatoria* is not very clearly defined. See Ersk. 3, 2, 24; *Rhind* v. *Commercial Bank of Scotland*, 29 Sc. Jur. 254; Bell's Com. by Shaw, 53.

[2] *Contra;* the bond does not purport to be for double the amount really due, but the correct sum is stated with a liquidated penalty. The form is as follows:—"I, A, grant me to have borrowed from B £1000, which I acknowledge, which sum I bind myself to repay to B at, etc., with £200 of liquidate penalty in case of default, and the legal interest; and I consent to the registration hereof for preservation and execution. In witness whereof, etc." The practice is to fix on one-fifth of the principal as a penalty to cover all damages arising from non-payment; and the penalty is always reduced to the expenses actually incurred. *Ramsay* v. *Goldie*, 4 S. D. 744.

The advantage of taking a bond as a security is, that in the event of the death of the obligor, the debt will in general be entitled to be paid out of the assets, before all simple contract debts.[1]

But there is no privilege as regards speedy action and execution; on the contrary, while the action on a bond must proceed by the usual steps, an action on a bill of exchange is privileged, and execution can in general be had in twelve days.[1]

449. *Loan of money.*—A loan of money, whatever be the amount, can be proved[2] by parol evidence.

450. *Gift of money.*—So the fact of a gift of money, which has been actually delivered to the donee, may be proved[3] by parol evidence.

451. *Promise to pay money.*—A promise to pay money may be proved by parol.[4] But some consideration for the promise must be proved in the event of an action being brought.[5] An I O U addressed to, and produced by a party, is, after proof of handwriting, evidence

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IN SCOTLAND.

[1] *Contra;* the debt secured by bond will have no priority over any other debts, all being equal in rank; but summary execution may be had without the necessity of bringing an action, provided the bond, as is usual, contains a clause of registration for execution. Ersk. 2, 5, 54; Bell's Pr. 68. See *ante*, § 440*n*.

[2] *Contra;* if above £8 : 6 : 8, a loan of money cannot be proved by witnesses, but only by the debtor's writ or oath. M. 4474; *Birnie* v. *Darroch*, 4 D. B. M. 366; *Fraser* v. *Bruce*, 30 Sc. Jur. 70; *Braid* v. *Linton*, Ib. 385. So parole evidence is excluded as to a balance of debt originally above that sum; *Clark* v. *Glen*, 14 S. D. 966; and though the debtor admits receiving the sum, but denies it was a loan. *Hamilton* v. *Lindsay*, 1 W. S. 35.

[3] *Contra;* a donation of money can be proved only by the writ or oath of the giver. See *Barstow* v. *Inglis*, 30 Sc. Jur. 117; *Robertson* v. *Robertson*, Ib. 209. See also *post*, "Bills."

[4] *Contra;* if above £8 : 6 : 8, a promise to pay money cannot be proved except by the writ or oath of the promisor (M. 16,830; *Walker* v. *Home*, 6 S. D. 204); but the objection to parole evidence must be taken at the time, M. 12,225; *Hay* v. *Boyd*, 3 Murr. 16. So an I O U is evidence to go to a jury of an existing debt, but it is deemed weak evidence. Per L. Fullerton, *Hamilton* v. *Hope*, 25 Sc. Jur. 357; *Hamilton* v. *Struthers*, 31 Sc. Jur. 42.

[5] *Contra;* but if the sum is above £8 : 6 : 8, the promise cannot be proved by parole; Stair, 1, 10, 4; Ersk. 4, 2, 20; M. 12,286; M. 12,395; unless it is part of a contract, which may be proved by parole evidence.

of an account stated, or of an existing debt; and if existing, the law implies a promise to pay it.[a]

452. *Special agreement as to personalty.*—A special agreement as to personal estate, may be proved by parol evidence, except so far as it comes within the Statute of Frauds or other statute.[1]

453. *Mistake in contracts.*—Where there has been a mistake as to some material part of a written contract, arising out of mere accident, a court of equity, and also of law, will in many cases relieve a party. The objection may be set up in a court of law as a defence.[2] And a court of equity will order the writing or deed to be reformed, *i. e.*, drawn up according to the real intentions of the parties, if there was a preliminary agreement, which has not been properly carried out in the final contract. But it is no ground for redress either in a court of law or equity, that one or both parties mistook the meaning of a written contract, and acted on such mistake.[b]

454. Where money has been by mistake, or improperly, received, the party entitled may sue for it in a court of law by an action for money had and received.[3] While money, which has been paid under a mistake of fact, may be recovered back by this action, yet it is not recoverable, if paid under a mistake of law.[c 4]

455. *Fraud.*—Fraud is a good ground for proceeding in equity to set aside any deed or document procured thereby; or it may be set up as a defence[5] in a court of law to an action, founded on such

[a] *Fesenmayer* v. *Adcock*, 16 M. & W. 449.
[b] *Midland Gr. W. R. Co.* v. *Johnson*, 6 H. L. Cas. 798.
[c] *Bell* v. *Gardiner*, 4 M. & Gr. 11; *Brisbane* v. *Dacres*, 5 Taunt. 143.

IN SCOTLAND.

[1] *Contra;* an innominate contract as to moveables, it is said, can be proved only by writ or oath (M. 12,297; M. 12,414), unless there has been *rei interventus.* Ersk. 4, 2, 20. But this doctrine is obscure, and seems to be no longer to be relied on. Dicks. on Evid. 310.

[2] A contract in writing will be held valid till reduced on the ground of error, and that objection cannot be pleaded by way of exception or defence merely. Bell's Pr. § 14.

[3] The same, by an action of *condictio indebiti,* or repetition.

[4] It seems the law is now the same. *Wilson* v. *M'Lellan,* 4 W. S. 398; *Dickson* v. *Monkland R. Co.* 5 W. S. 445; *Dickson* v. *Halbert,* 26 Sc. Jur. 266; see *Johnston* v. *Johnston,* 29 Sc. Jur. 320.

[5] In all cases where a ground of action is excluded by a deed, or document, or judgment, it is necessary to reduce such deed or judgment before the action can be maintained. Yet if the deed, etc., was obtained by fraud, such fraud may be set up by way of exception. Bell's Pr. § 13.

deed or document. When fraud is alleged in a court of equity, the details of the fraud must to some extent be set forth—in other words, the allegations must be specific.[a] But when fraud is alleged in a court of law, in defence or replication, it is enough to allege it generally, the details being mere matter of evidence at the trial.[1]

456. *Constructive fraud.*—In courts of equity certain classes of circumstances give rise to what are called constructive frauds, and relief will be given by a court of equity. Thus contracts and conveyances, whereby children secure benefits to their parents, or to those standing in *loco parentis*, will be set aside on the ground of undue parental influence, if shown to be unreasonable, and against good faith, unless third parties have acquired an interest in them.[b] So in contracts and transactions between attorney and client, the *onus* lies on the attorney to show that the transaction was fair.[c] Bargains with needy expectant heirs, remaindermen, and reversioners,[2] must be shown to be for full valuable consideration, even though the bargain was made known to the persons having the means of obviating the necessity of alienation in the circumstances.[d] So dealings with sailors are jealously watched, as that class is treated by a court of equity as peculiarly liable to imposition.[e]

457. *Duress.*—A contract entered into by a party, who is under duress, is voidable at his option.[f] And he may either file a bill in equity to set aside the deed or document so obtained, or set up duress

[a] *Curzon* v. *Belworthy*, 3 H. L. Cas. 742.
[b] Story Eq. Jur., § 309; *Hoghton* v. *Hoghton*, 15 Beav. 278; *Espley* v. *Lake*, 10 Hare, 260.
[c] Story, § 310.
[d] Story, § 334-340; *Edwards* v. *Burt*, 2 De. G. M. & G. 55.
[e] Story, § 332.
[f] 2 Inst. 483; Whelpdale's Case, 5 Co. 119, Res. 2.

IN SCOTLAND.

[1] There is no distinction between law and equity, and fraud must in all cases be alleged with reasonable particularity. See *Irvine* v. *Kirkpatrick*, 7 Bell's Ap. 180; *Shedden* v. *Patrick*, 26 Sc. Jur. 420; 1 Macq. 535. *National Exch. Co.* v. *Drew*, 27 Sc. Jur. 356; 2 Macq.

[2] *Contra*; this doctrine was expressly repudiated in the case of a reversioner; and a sale by an heir substitute of entail of his contingent reversionary interest was refused to be set aside, though he was shown to be needy, and the price to be grossly inadequate. Nothing short of a combination of the elements of facility, lesion, and circumvention will avail to reduce such a contract. *M'Kirdy* v. *Anstruther*, 1 D. B. M. 855. Probably the same doctrine would extend to other cases stated in the text.

as a defence[1] in a court of law, when sued. What amounts to duress is often a difficult question arising out of the whole circumstances.[a] Money paid under duress may be recovered back by an action for money had and received.

458. *Maintenance and champerty.*—It is not forbidden to any counsel or attorney to purchase real estate[2] pending a litigation regarding it, provided he chooses to take the risk, unless fraud can be made out, or it amounts to maintenance or champerty. It is champerty for a person who has been out of possession of real estate, or whose predecessors have been so, for a year, to sell or bargain as to his title, and the contract is void.[b] An agreement, whether by an attorney or stranger, officiously to advance money to another to prosecute or defend a suit, is void.[c] And where one party agrees to pay the expense of ascertaining or establishing a right, supposed to belong to another, on the terms of receiving half the estate or benefit obtained, such an agreement, whether or not strictly amounting in law to champerty or maintenance, is contrary to public policy, and

[a] See 2 Smith's L. C. 240.

[b] 32 Hen. VIII. c. 9; 4 Bl. Com. 134; *Re* Masters, 4 Dowl 21; *Doe* v. *Evans*, 1 C. B. 717; *Cook* v. *Field*, 15 Q. B. 460.

[c] See *Stanley* v. *Jones*, 5 M. & P. 207; *Williams* v. *Protheroe*, 3 Y. & J. 135; *Sprye* v. *Porter*, 7 E. & B. 58.

IN SCOTLAND.

[1] *Contra;* a deed or contract made or entered into under force and fear must be formally reduced, and the objection cannot be set up as a defence. Stair, 1, 9, 8; Ersk. 3, 1, 16; 4, 1, 26.

[2] If a counsel or law agent purchase from his client heritage, which is the subject of a suit, the sale is good, but he is liable to deprivation (*i.e.*, to be disbarred or struck off the rolls respectively). And he is forbidden by statute, as well as common law, to receive as remuneration a share of the property in dispute. 1594, c. 220; *Johnstone* v. *Rome*, 9 S. D. 364. But an agreement to stipulate for remuneration only on success is not of itself necessarily held illegal. *Gilfillan* v. *Henderson*, 10 S. D. 23; *Clyne* v. *Swanson*, 8 S. D. 718; *Manson* v. *Robertson*, 11 S. D. 718; *Bolden* v. *Foggo*, 12 D. B. M. 798; M. 9496. The statute applies only to an advocate or law agent. An agreement between a town agent and a country agent to allow the latter a share of the profits, is *pactum illicitum*. *Gilfillan* v. *Henderson*, 6 W. S. 489; but it is to be observed that in such a case the country agent is not himself entitled as such to practise in the Superior Court. An agreement to make a gift of £1000 over and above the bill of costs to a law agent during the employment has been set aside, as being incompatible with the proper performance of his duty. *Anstruther* v. *Wilkie*, 28 Sc. Jur. 136.

will be set aside.[a] But an attorney may freely, and sometimes does agree to be paid his bill of costs only in the event of the success of his client. He may also agree to take a gross sum from his client in lieu of costs.[b] It is also legal and usual for a town agent to allow the country solicitor or attorney a share of the profits of the suit.[c]

459. *Wagers.*—At common law, actions on contracts by way of wagers were competent, except so far as they were *contra bonos mores* or against public policy. But now by statute (8 & 9 Vic. c. 109, § 18) all contracts, whether by parole or in writing, by way of gaming or wagering, are null and void, except subscriptions towards a lawful game, sport, pastime, or exercise. Thus colourable contracts to sell shares, stock, etc., will be void as wagering.[d] Lawful games are such as horse-racing, steeple-chases, foot-races, and dominoes.[1]

460. *Sunday.*—Contracts made on Sunday are not void at common law; but if made in the course of the ordinary business of tradesmen, artificers, workmen, or labourers (works of necessity and charity excepted), they are void by the Lord's Day Act.[e] [2] A few cases are excepted from the operation of the statute, as where food is sold in inns, cook-shops, and victualling houses, to persons who cannot be otherwise provided.[f] So as to milk sold at stated hours; or mackarel before and after divine service;[g] or bread under certain restrictions.[h] Where, therefore, a person is not a tradesman, etc., as, for example, where he is an attorney, surgeon, or farmer, the

[a] *Reynell* v. *Sprye*, 1 De G. M. & G. 660.
[b] *Re* Whitcombe, 8 Beav. 140.
[c] *Scarce* v. *Whittington*, 2 B. & C. 11.
[d] *Grizewood* v. *Blane*, 11 C. B. 538.
[e] 29 Ch. II. c. 7, § 1.
[f] *Ibid*, § 3.
[g] 10 & 11 W. III. c. 24.
[h] 5 & 6 W. IV. c. 37.

IN SCOTLAND.

[1] At common law the Courts refuse to entertain a mere wagering dispute, as being a *sponsio ludicris*, and confine themselves to serious business. M. 9524; *Harvey* v. *Muller*, 7 D. B. M. 398. It seems the stat. 8 & 9 Vic. c. 109 applies to Scotland. *Thomson* v. *Foulds*, 29 Sc. Jur. 372.

[2] Bargains or contracts made on Sunday are not null at common law, but there are numerous statutes on the subject prohibiting such contracts, and which make no distinction between contracts made in the ordinary business of persons and those not so made, nor do they confine the prohibition to artificers and workmen; but there is an exception of works of "necessity and mercy." Stats. 1593, c. 169; 1694, c. 201; see *Phillips* v. *Innes*, 2 Sh. & M'L. 465; *Elliott* v. *Faulke*, 6 D. B. M. 41. It is doubtful how far these statutes are in desuetude. *Jennings* v. *Burnet*, 25 Sc. Jur. 175.

contract, though made on Sunday, is not invalid.[a] And where the tradesman is not contracting in the exercise of his ordinary calling, as where a baker, not being a horse-dealer, sells a horse on Sunday, the contract is good.[b]

461. *Payment of money and performance.*—Performance of an agreement, or of an obligation to pay money, constituted by writing, can be proved by parole evidence.[1] So where the agreement or obligation was not constituted by writing.[2]

462. *Stamped receipt.*—Though a stamped receipt or acknowledgment of the payment of money has been given by the creditor, it is not in general conclusive, but merely *prima facie* evidence of payment, and hence oral evidence may be given[3] to contradict or explain such receipt, and rebut its legal operation.[c] The only receipt which is conclusive and admits of no contradiction in a court of law, except

[a] *Peate* v. *Dicken*, 1 C. M. & R. 422; *Scaife* v. *Morgan*, 4 M. & W. 270; *Sandiman* v. *Breach*, 7 B. & C. 96.

[b] *Drury* v. *Defontaine*, 1 Taunt. 131.

[c] *Lampon* v. *Clarke*, 5 B. & Ald. 611; *Skaife* v. *Jackson*, 3 B. & C. 423; *Graves* v. *Key*, 3 B. & Ald. 313; *Furrar* v. *Hutchinson*, 9 A. & E. 641.

IN SCOTLAND.

[1] *Contra;* payment of money due under a written obligation can be proved only by the writ or oath of the payee (Stair 4, 43, 4; Ersk. 4, 2, 21; M. 12,357), except in case of fraud (M. 12,309; *Foggo* v. *Hill*, 2 D. B. M. 1322), or where the payment was part of a transaction (*Glasgow Infirmary* v. *Caldwell*, 30 Sc. Jur. 1). But performance of a written contract *ad factum præstandum* may be proved by parole. M. 12,356 *et seq.;* Stair, 4, 43, 4; Ersk. 4, 2, 21.

[2] *Contra;* payment of money due under a verbal contract can be proved only by writ or oath, if the sum exceeds £8 : 6 : 8. Ersk. 4, 2, 21; *Tod* v. *Flockhart*, Hume, 498; M. 12,362; M. 12,365. Yet payment, whether the money is due under a written obligation or not, may often be inferred from circumstances, such as taciturnity or non-claim, which can be proved by parole. M. 12,701-2; *Stewart* v. *Macmochie*, 14 S. D. 412; *Seath* v. *Taylor*, 10 D. B. M. 377. And there is no well-defined principle on which the Court relaxes the general rule, so as to admit parole evidence. See *Woodrow* v. *Wright*, 34 Sc. Jur. 25; *Wilson* v. *Marshall*, *Ib.* 2; *Rose* v. *Kennedy*, 35 Sc. Jur. 598; *L.-Adv.* v. *Macneill*, 36 Sc. Jur. 304; *Mackenzie* v. *Brodie*, 21 D. B. M. 1048; and cases *ante*, § 449-51, n.n.

[3] *Contra;* the receipt of money exceeding £8 : 6 : 8 cannot be proved by witnesses. Stair, 4, 43, 4; *Anderson* v. *Forth Marine Ins. Co.*, 7 D. B. M. 268. See last two notes. Moreover, parole evidence is not in general admitted to contradict a written receipt, in the absence of fraud. See *Crawford* v. *Bennet*, 2 W. S. 608.

in the case of fraud, is one under seal.[a] Yet, in a court of equity, the whole circumstances under which a deed was executed will be inquired into.[b] Moreover, a stamped receipt is not the only mode of proving payment, for the evidence of witnesses is quite conclusive without it.

463. *Presumption of payment.*—After the lapse of a great time, independently of the Statute of Limitations, payment will be presumed,[c] as in the case of servants' wages.[d] Where money is due at regular intervals, as rent,[1] the production of a receipt of rent due on a certain day is strong presumptive evidence that all prior rent has been paid.[e]

464. *A stranger paying a debt.*—Where A owes money to B, and a stranger hears of this and voluntarily pays the debt, he cannot sue A for the sum so paid; for if so, any person may thrust a contract on another without the knowledge or consent of the latter, and whether he will or no. To enable a third party to recover the money so paid, he must prove that he was requested by A, either expressly or impliedly, to pay the debt, in which case, and in which case only, he may maintain an action against A for money paid.[f] Yet the law in many cases construes an implied request out of the circumstances, and questions of nicety often occur in determining when a request is to be so implied; and this has been done in the case where a stranger volunteered to bury a deceased person, so as to entitle him to sue the executor for the expense.[g] Nor can a court compel B to make an assignment of securities to a stranger so paying the debt of

[a] See *ante*, § 436.
[b] *Melland* v. *Gray*, 2 Y. & C. C. C. 199.
[c] *Cooper* v. *Turner*, 2 Stark. 497; *Duffield* v. *Creed*, 5 Esp. 51.
[d] *Sellen* v. *Norman*, 4 C. & P. 80; *Evans* v. *Birch*, 3 Campb. 10.
[e] Gilb. Ev. 309.
[f] *Stokes* v. *Lewis*, 1 T. R. 20; *Child* v. *Morley*, 8 T. R. 610; *Jeffries* v. *Gurr*, 2 B. & Ad. 833; *Sleigh* v. *Sleigh*, 5 Exch. 514.
[g] *Ambrose* v. *Kerrison*, 10 C. B. 776.

IN SCOTLAND.

[1] It is laid down that three consecutive discharges of periodical payments, as rents, interest, feu-duties, etc., form a presumption of payment of all preceding rent, etc.; and this is called the rule *apocha trium annorum*, obviously an artificial rule invented by a court before juries were in use, as no jury would hesitate to infer payment from slighter evidence. Ersk. 3, 4, 10.

A, except where the latter is a surety who discharges the debt.[a] It seems not decided whether and how far a payment made by a stranger will be a bar to an action against A for the debt.[b] [1]

465. *Excuse for non-performance of contract.*—When a man voluntarily undertakes by his contract to do something which is not impossible, he is not excused either at law or equity from performance merely by inevitable accident; as, for example, if he undertakes generally to pay rent, he must continue to pay, though the house is burnt down;[c] [2] yet if the duty is cast upon him by law, he is excused, if performance becomes impossible by the act of God.[d] But in the case of a gratuitous bailment or contract to carry a chattel from one place to another, it is an excuse that the carrier was forcibly robbed without any negligence on his part.[e]

466. *Tender of performance.*—Where A covenants to pay money, or to give a promissory-note, or goods, etc., to B, and no place is mentioned where this is to be done, A is bound to seek out B, and make a tender to him of performance.[f] [3] And where no time is specified for paying or doing the act, a cause of action immediately arises to B.[g]

467. If, however, before a writ of summons is actually issued,

[a] 19 & 20 Vic. c. 97, § 5.
[b] See *Jones* v. *Broadhurst*, 9 C. B. 173; *Belshaw* v. *Bush*, 11 C. B. 207.
[c] Story Eq. Jur. 101.
[d] *R.* v. *Leicestershire*, 15 Q. B. 89.
[e] *Walker* v. *British Guarantee Co.* 21 L. J. Q. B. 257.
[f] Litt. § 340, 342.
[g] *Birks* v. *Trippet*, 1 Wms. Saund. 33 *b*.

IN SCOTLAND.

[1] *Contra;* any stranger may, without A's knowledge or consent, go and pay a debt due from A to B, which has been demanded. A cannot prevent the stranger getting an assignation of the debt from B, if B is so inclined, so as to enable the stranger to sue A. A creditor is not however bound to accept payment from a stranger, unless he is about to press the debtor by execution. "If the creditor insists on putting the debtor in jail, he must assign his security to a third party paying the debt." *Per* L. Mackenzie in *Smith* v. *Gentle*, 6 D. B. M. 1164. The right of the stranger to an assignation is an equitable one, and the court may compel B to grant it, if it is not prejudicial to B. See *Rainie* v. *Milne*, 1 S. D. 377; *Cunningham* v. *Hutton*, 10 D. B. M. 307; Ersk. 3, 5, 11.

[2] *Contra;* inevitable accident in general excuses the party. The destruction of the subject, without fault, extinguishes the obligation. Bell's Pr. § 571; Bell's Com. by Shaw, 70.

[3] There seems no difference on this subject.

A make a tender of the sum due, this will prevent B recovering costs in the action, provided A duly pay the money into court under the plea of tender.[a] [1]

467. *Tender on the day appointed.*—Where a particular day certain was agreed to be the day of performance, the tender must be on that very day.[2] If no hour was mentioned, then the tender may be at any hour of the day, so that the money can be paid, or the thing can be completely performed before 12 o'clock p.m. But in some cases, by a particular usage, the tender must be made earlier, as in the presentment of bills of exchange within business hours.[b]

468. *Tender of rent.*—Where rent becomes due, the tenant may tender it to the landlord wherever he finds the latter; but if he cannot find him, then the tenant must be ready, at the door of the mansion-house,[3] or other most patent place on the premises, to pay the money in day-light. If the rent is due under a covenant to pay, and no place mentioned, then the tenant is bound to find the landlord and pay the money.[c]

469. *Tender in money.*—A payment must be made in gold or in bank notes. There are no bank notes issued under £5.[4] The Bank of England must pay its notes in gold, if required, and so each of its branches must pay notes made specially payable at such branch. All other banks and private persons are entitled to pay debts above £5 with Bank of England notes.[d] [5] Yet a payment with notes of country banks, or a banker's cheque, is valid, if not specially objected to at the time on that ground.[e]

[a] *Briggs* v. *Calverley*, 8 T. R. 629; *Moffat* v. *Parsons*, 5 Taunt. 307; see C. L. P. Act 1852, and rules of Court.

[b] Wade's Case, 5 Co. 114*b*; *Startup* v. *Macdonald*, 6 M. & Gr. 593.

[c] *Haldane* v. *Johnson*, 8 Exch. 689.

[d] 3 & 4 W. IV. c. 98.

[e] *Polglass* v. *Oliver*, 2 Cr. & J. 15; *Jones* v. *Arthur*, 8 Dowl. 442.

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[1] The same, if B consigns the money in a bank after giving A due notice.

[2] The same.

[3] There seems to be no substantial difference as to this. 2 Hunter, L. & T. 274.

[4] *Contra*; £1 notes are the common currency. The head bank is bound to pay in gold, if required.

[5] Bank of England notes are also a legal tender for payments above £5. Bell's Pr. § 1334.

470. *Effect of tender on costs.*—The effect of an unconditional and valid tender of a debt due, if the amount is paid into court on action afterwards brought, is to prevent the plaintiff recovering costs on the plea of tender.[1] But where a sum has been offered after an action of damages, on grounds independent of contract, has been brought, and the jury give no more as damages, this does not affect the question of costs.[2] An exception is however made in favour of magistrates, who are empowered by statute to tender a sum as amends to the plaintiff, and if the jury give no larger sum as damages, a verdict will be given for the defendant.

471. *Payment of money into Court by defendant.*—In all actions for breach of contract, and generally in all actions whatever, except for assault, false imprisonment, slander, libel (except in a newspaper), seduction, and malicious prosecution, the defendant may, with leave of the court, pay a sum of money into court as compensation; and if the plaintiff is not satisfied, but insists in going to trial, and the jury do not, by their verdict, give a larger sum as damages, the effect is, that the defendant has his costs from the time of such payment into court.[a] In the cases excepted it is not competent for a defendant to pay money into court.

472. *Release and discharge of contracts.*—Contracts under seal can only be released and discharged by a release or discharge under seal, that is, by an instrument of equal force and validity.[b] Yet a court of equity may give effect to parole licences or dispensations, in cases where it would be inequitable to allow one party to insist on his legal title after the position of the other party has been altered;[3] and acts and declarations may sometimes be set up as an

[a] Pat. M. & M.'s C. L. Practice, 917. [b] *West* v. *Blakeway*, 3 Sc. N. R. 199.

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[1] So if the defender, during action, judicially tender a sum equal to or exceeding what is ultimately found due, the pursuer pays the expenses after the date of tender. The tender must be founded on in the process. *Anderson*, 14 S. D. 54; *A. B.* v. *Davidson*, 15 S. D. 306; Imrie, 21st Jan. 1847, 9 D. B. M. 522; *Bisset*, 10 D. B. M. 233; *Logan*, 12 D. B. M. 841.

[2] *Contra;* in actions for damages generally, the defender may tender a sum as satisfaction; and if the jury give a less sum as damages, this will subject the pursuer to expenses. *Strachan* v. *Monro*, 7 D. B. M. 993.

[3] A debt constituted by writing cannot be extinguished without either the writ or oath of the creditor. And generally the renunciation of a

equivalent to a release.[a] And so a court of law may often allow such matter to be pleaded as an equitable defence.[b] There is also an exception in the case of penal bonds, for a parole agreement by the parties before the day of payment to do something else as a satisfaction will be enough.[c]

473. Simple contracts may, before breach, be released or discharged by parole agreement,[d] subject, however, to the rule, that a mere subsequent oral agreement not acted upon, will not be allowed to vary a contract in writing.[e] [1]

474. When a contract has once been broken, the cause of action which thereupon accrues can only be discharged at law by a release under seal, or by an agreement between the parties that something shall be done or given on the one side, and accepted on the other side, as a satisfaction, generally called an "accord and satisfaction."[f] But there is an exception in the case of bills of exchange and promissory-notes, for by the law-merchant there may be a release and discharge of a debt due on such instruments by word of mouth, unaccompanied by writing or any solemn instrument.[g] [2]

475. A covenant to pay money or perform some act cannot be discharged at common law before breach, by any contract or agreement which is not under seal,[h] for nothing can discharge a covenant to pay on a certain day, but actual payment or tender on that day.[i]

[a] 2 Spence Eq. Jur. 912; *Norton* v. *Wood*, 1 Russ. & M. 478.
[b] 17 & 18 Vic. c. 125, § 83.
[c] Litt. § 344; Co. Litt. 212 *b*.
[d] *Goss* v. *Nugent*, 5 B. & Ad. 65.
[e] *Stead* v. *Dawber*, 10 A. & E. 57.
[f] *Langdon* v. *Stokes*, Cro. Car. 383; see also Cro. Jac. 483, 620.
[g] *Foster* v. *Dawber*, 6 Exch. 839; *Edwards* v. *Chapman*, 1 M. & W. 231.
[h] *Snow* v. *Franklin*, 1 Lutw. 358; *Spence* v. *Healey*, 8 Exch. 668.
[i] *Poole* v. *Turnbridge*, 2 M. & W. 226.

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right or obligation, constituted by writing, cannot be proved by parole evidence; for a written obligation is held usually to imply a written discharge. Ersk. 3, 4, 8; *Scott* v. *Cairns*, 9 S. D. 247. Yet the court will sometimes relax the rule and admit parole evidence. Dickson on Evidence, p. 329.

[1] An obligation constituted verbally may be extinguished by a verbal declaration of the creditor that he passes from the debt. Ersk. 3, 4, 8. But it is otherwise as to an obligation constituted by writing. See last note.

[2] So a discharge, whether before or after breach of contract, may be by acceptilation. Ersk. 3, 4, 8. Payment of bills and promissory-notes can in general only be proved by the drawer's writ or oath. See *post*, § 564 *n*.

Yet, accord and satisfaction is a good defence after a breach of contract, whether the contract was under seal, or not under seal.[a] [1]

476. *Assignment of debts.*—A chose in action, with the exception of bills of exchange and bills of lading, is not assignable at common law, so as to enable the assignee to sue in his own name. But it is assignable in equity without the consent of the debtor, and the assignee may discharge the debtor without the concurrence of the assignor. At common law though the debt is assignable, yet power may be given to a third party to sue for it in the name of the creditor, by means of a power of attorney, which may be by writing, unsealed, or even by parole.[b]

477. Where an assignment has been executed, the assignee must sue in the name of the assignor in courts of law; but the latter may insist on being indemnified. If the debt is equitable only, that is, such as can only be recovered in a court of equity, it may be assigned without a power of attorney, and the assignee may sue in equity in his own name.[2]

478. The assignment need not, strictly speaking, be intimated by notice to the debtor,[3] though this is generally necessary, in order to prevent other assignees acquiring priority; and, if notice is not given to the debtor, he will be in safety to pay to the assignor, whose

[a] Blake's Case, 6 Co. 43 *b*; *Smith* v. *Trowsdale*, 3 E. & B. 83; *Jones* v. *Sawkins*, 5 C. B. 142.

[b] *Howell* v. *M'Ivers*, 4 T. R. 690; *Heath* v. *Hall*, 4 Taunt. 326.

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[1] A discharge of a written contract can only be proved by a written discharge, or by the oath of the creditor, and it makes no difference whether a breach has taken place or not. See *ante*, § 461 *n.*

[2] The assignee or cessionary can sue in his own name. The assignation is regarded as a proper conveyance, and not as a procuratory. Book debts cannot be conveyed by indorsement. *Taylor* v. *Scott*, 9 D. B. M. 1504; *Sutherland* v. *Munro*, 10 D. B. M. 87. See *Barstow* v. *Inglis*, 30 Sc. Jur. 117; Bell's Com. by Shaw, 558. But the creditor may draw a bill on the debtor in favour of A (an assignee) for the amount, and this will be a good title to sue for and discharge the debt.

[3] Intimation to the common debtor is absolutely necessary to complete the assignation of debts, and the date of intimation is the date of the transfer. Ersk. 3, 5, 3; *Buchan* v. *Farquharson*, 24th May 1797, F. C. Hence a second assignee, by first intimating the assignation, acquires priority, even though not strictly acting in *bona fide*.

discharge will relieve him. It is said to be the duty of the assignee, in most cases of assignments of choses in action, to give this notice to the debtor. And in the case of incumbrancers on a fund, the legal interest of which is in a trustee, if the second incumbrancer give notice to the trustee, and neither of them know of a prior incumbrance, the second incumbrancer will be entitled to priority.[a] But notice, when given, need not[1] be given by any formal notarial protest. It is enough if the notice be given to the trustee or debtor, so as to call his attention to the fact. The assignee takes the debt subject to all its equities.[b] [2]

479. *Debts payable in futuro.*—Where a party is bound by bond or otherwise to pay money at a future day, whether he becomes insolvent or not before that time, there is no mode of attaching his goods by way of security until the day of payment; and no cause of action arises till that time. In like manner, the creditor could not retain funds of the debtor in his hands by way of security.[3] But if such party become bankrupt or insolvent, these debts can be proved against his estate. When an annuity is granted, it is usual to take a collateral bond and warrant of attorney to secure its punctual payment, by means of which a summary remedy may be had. And an

[a] *Smith* v. *Smith*, 2 C. & M. 231; *Meux* v. *Bell*, 1 Hare 73; *Deazle* v. *Hall*, 3 Russ. 1.

[b] *Mangles* v. *Dixon*, 3 H. L. Cas. 702; *Smith* v. *Parker*, 16 Beav. 119.

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[1] *Contra;* the regular mode of giving intimation is by a notarial instrument, but this may be dispensed with. If a letter has been sent to, and received by the debtor, and its receipt acknowledged or admitted by letter, that is sufficient. *Wallace* v. *Davies*, 25 Sc. Jur. 415; *Bain* v. *Cunningham*, M. 860; Bell's Com. by Shaw, 559. But mere private knowledge of the debtor is not enough, in competition with subsequent formal intimations. *Dickson* v. *Trotter*, M. 873; Ersk. 2, 1, 28.

[2] The cessionary does not always take, subject to latent equities. *Redfearn* v. *Someruail*, 17 F. C. 681; but see *Gordon* v. *Cheyne*, 2 S. D. 675.

[3] *Contra;* where the debt is either future or contingent, the creditor may arrest the debtor's funds, or adjudge his land in security of such debts. Ersk. 3, 1-6; 3, 4, 15; 3, 6, 18. And at common law, if the debtor is *vergens ad inopiam*, or is diminishing a security relied on, diligence for security may proceed, or the creditor may retain funds of the debtor in security. D. Queensberry, 11th July 1817, F. C. Bell's Com. by Shaw, 44. So a creditor entitled to an annuity can arrest or adjudge in security. *M'Donald* v. *M'Leod*, 15th Jan. 1811, F. C.

executor may be compelled in some cases to find security for legacies payable *in futuro*.

480. *Remedy for debts generally.*—Debts arising on matters of contract are chiefly and often exclusively recoverable in courts of law; legacies are not termed debts, and can in general only be sued for in a court of equity. In seeking to recover a debt, the mode of procedure is an action at common law, which consists of several stages; and the defendant may, by his pleading, protract the final stage of judgment.[1] Until judgment is obtained, nothing can be done in the way of obtaining payment or security, unless the defendant is about to leave the country, or the debtor is sued in the Mayor's Court in the city of London, and some other places, the process in that case being called foreign attachment. When judgment is signed, the judgment-creditor can then, but not before, by the process of attachment at common law, attach in the hands of third parties, debts due to the defendant, but cannot attach legacies due to him. The creditor can also, after judgment, but not before, sue out execution against the debtor's person, and his real and personal estate. The fruits of an action are thus often lost by the length of time which must necessarily elapse before final judgment can be obtained. The only action which is privileged is an action on a bill of exchange, to which no defence is in general allowed, unless with leave of a judge; and judgment can be signed in twelve days. There is, however, an expeditious mode of proceeding for ordinary debts

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[1] *Contra*; in all cases the creditor can at once arrest (attach) not only the debts due, but goods belonging to the debtor in the hands of third parties, concurrently with raising the action. This is called arrestment in security. See *Laidlaw* v. *Smith*, 2 Rob. Ap. 490. The creditor may even arrest goods in his own hands. 19 & 20 Vic. c. 60, § 3. He thus acquires a hold over the goods and debts till decree is obtained, when he can proceed against the goods or debts arrested, and also against the person and other heritable and moveable estate. Moreover the creditor can, in like manner, in most cases, at the outset of the action, use inhibition to prevent the debtor selling his lands or contracting debt to his prejudice. Further, bills of exchange and bonds and other deeds securing liquid debts, containing clauses of registration, are so far privileged, that decree can be extracted without action, no defence being allowed, although the debtor, if he has good grounds of defence, can suspend the proceedings on finding security to pay the debt and costs.

against a trader, in the Bankruptcy Court, the result of which is, that if he do not pay in seven days, or give security, he may be declared a bankrupt.

481. *Staking the truth of the cause on adversary's oath.*—Though in general a plaintiff or defendant is compellable in all civil cases to be a witness, and may be examined on oath, there is no mode of staking the truth of his case on the voluntary answer on oath of his adversary, as an equivalent for any affirmative evidence, or after such evidence has failed.[1]

482. *Interest.*—Interest is not impliedly due at common law on

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IN SCOTLAND.

[1] *Contra;* this mode of proving a party's case, called a *reference to oath* of the opponent, is competent in general, as a last resource, where the party despairs of other evidence. If the allegations of the party are not sufficiently explicit, or the matter is one of law and not fact, the reference is not allowed; and the oath will not receive effect so far as it contradicts the deponent's own written statements or admissions on record. Dickson on Evid. 780, *et seq.*; Bell's Pr. § 2269. When a reference is made during the cause, it may be directed to a single fact; but if made after decree, it must embrace the whole cause and all facts conclusive of the cause. *White* v. *Murdoch*, 9th June 1812, F. C.; *Butters* v. *Loch*, 8 S. D. 843; *Thomson* v. *Patterson*, 2 Deas and And. 177; *Ibid.* 189. The oath is in the nature of a reference or transaction, and is conclusive whichever way the party answers. Ersk. 4, 2, 8; 3 Bell's Ill. 91. The party may resort to this proof even after verdict or judgment, provided the decree has not been extracted. *Ibid.*; *Nisbet* v. *Taylor*, 3 D. B. M. 332; *Sayer* v. *Haldane*, *ib.* 1005. He may retract before the oath is sworn, on paying expenses. 3 Bell's Ill. 93; Dickson, 792. This mode of proof is not allowed where the contract requires to be in writing. Though the court seldom refuses to allow the reference, it has refused in circumstances where the truth was not likely to be obtained in this way. 3 Bell's Ill. 98; *Ritchie* v. *Mackay*, 3 W. S. 349; *Johnson* v. *Grant*, 13 S. D. 606; *Pattinson* v. *Robertson*, 9 D. B. M. 226. It is for the court and not for a jury to construe the meaning of the answer, which is often so qualified as to give rise to difficult questions. A qualification which the court thinks necessary to the complete answer, and which is an essential ingredient in it, and is incompatible with the constitution or continuance of the obligation, is said to be an intrinsic quality. But where the obligation is admitted, and the party adds something to displace it, but which it lies on him to prove by other evidence, that is said to be an extrinsic quality. Thus, if the party admit the debt, but say it is paid, then payment is intrinsic; but if he admit and say that he has another debt against his opponent which will fall to be compensated, then compensation is extrinsic. Dickson on Evid. 826. See Ersk. 4, 2, 11; *Gifford* v. *Rennie*, 15 D. B. M. 451; *Thomson* v. *Duncan*, 17 D. B. M. 1081.

any debt though liquidated;[1] but by usage of merchants it is allowed on bills of exchange and promissory-notes, and it is generally given at the discretion of the jury, unless the creditor has been remiss in suing. There is also an exception in favour of money ordered to be paid by an award when sued for by action; also in favour of money due on a bond. But in all cases, interest, either simple or compound, may be due by express contract, or by a contract implied by the course of dealing. By Statute 1 & 2 Vic. c. 110, § 17, interest is due on all judgment debts till payment. Also if the debt is a sum certain, payable by virtue of some writing, interest may be given by a jury from the date at which the debt is stated to be payable, or if no time is stated, then from the date of a formal demand made in writing, and accompanied with notice to the debtor claiming interest in default of payment.[a] So interest is due on debts not arising under any writing, if a written notice is given that interest will be claimed from the date of the notice.[b]

483. *Damages for breach of contract.*—The only remedy which a court of law could, until recently, give for the breach of a contract was a sum of money by way of damages to be assessed by a jury. But since 1854 and 1856, in actions of detinue for detention of a chattel, and actions for breach of contract in not delivering goods sold, the indirect effect of the execution is to compel the defendant to render up the specific chattels.[c] In a few cases also, viz., where some public duty is involved in and mixed up with the contract, a court of law may, by mandamus, order the contract to be specifically performed, or by injunction prevent its breach.[d] But in the vast majority of cases a court of common law can neither compel specific performance, nor restrain the breach of a contract; it can only give

[a] 3 & 4 Will. IV. c. 42, § 28. [b] *Ibid.*
[c] 17 & 18 Vic. c. 125, § 78; 19 & 20 Vic. 97, § 2.
[d] 17 & 18 Vic. c. 125, § 68-82.

IN SCOTLAND.

[1] *Contra;* interest is in general due *ex lege* in all cases of debt, even though not liquid, where there has been a breach of engagement, or *mora* in judgment. 2 More's Stair, 78 *n*; *Brown* v. *Brown*, 4 W. S. 28; Ersk. 3, 3, 80. It is also due by statute on sums, to pay which execution of a charge has been registered. 1621, c. 20; 1 & 2 Vic. c. 114, § 5, 10. Interest is also due on bills of exchange by statute. See *post*, § 565.

a sum of money as damages, by way of compensation, after the contract has been broken.[1]

484. *Specific performance of contracts.*—Nor does a court of equity in all cases order specific performance of contracts as a matter of course. On the contrary, it professes to do so mainly on the assumption that damages will not be a sufficient remedy.[2] Hence it practically confines the remedy of specific performance to a few cases. Such are contracts for the sale and purchase of lands; and contracts for the sale of some peculiar chattel having a *pretium affectionis*, as a statue, picture, antique horn, etc.[a] So contracts to sell the goodwill of a trade, to enter into partnership, to build a bridge on the defendant's land for the use of the plaintiff, to settle money in consideration of marriage, are usually ordered to be specifically performed. But even the above classes of contracts will not be specifically performed by a court of equity, unless certain equitable conditions are fulfilled, such as—that both parties were competent to contract—that the terms were certain and definite—that there was a valuable consideration—and that the plaintiff has shewn due diligence and good faith. Where a contract has been in part performed, this circumstance will often give a court of equity jurisdiction to enforce specific performance. On the other hand, a court of equity could not, until recently, give damages for a breach of contract. If the court thought damages the proper remedy, it could only send the case to a court of common law to be tried by a jury. But now, in suits for specific performance, the party may ask damages in the alternative; and if the court thinks

[a] Story's Eq. Jur. § 712, *et seq.*; *Pusey* v. *Pusey*, 1 Vern. 272; *Lowther* v. *Lowther*, 13 Ves. 95.

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[1] *Contra;* there being no separate administration of remedies as legal or equitable, the court administers both, and the following is the rule. An obligation *ad factum præstandum, i.e.*, to do some specific act, may be specifically enforced in all cases where it is capable of being specifically performed; but where the party refuses to implement, or the act becomes impossible, damages only can be awarded. Hence it is common in all cases to sue in the alternative for implement or damages. The decree is executed by way of a charge to perform the act, failing which, other modes of execution are resorted to.

[2] *Contra;* implement is not ordered, on the ground that damages are not a sufficient remedy; but it is granted as a matter of course in all cases where the act is not impossible. See last note.

proper, it may summon a jury and try such questions itself. When a party has sued in a court of law for breach of contract, and has recovered damages, his equity to claim specific performance is gone; and if he is pursuing both remedies concurrently, the court of equity will put him to his election as to which remedy he will abide by.

485. *Set-off.*—Where mutual debts, unconnected with each other, existed, and one of the parties indebted sued the other, the latter had no other remedy but a cross action; but now, by statute, he can plead the set-off,[1] so as to save a cross action, when the debts are between the same parties and in the same rights.[a]

STATUTE OF LIMITATIONS.

486. *Prescription at common law.*—At common law there was no fixed time within which a cause of action became extinguished, or a debt was presumed to be abandoned. But statutes of limitation have been passed to enable a party to set up as a defence to an action the lapse of time since the cause of action accrued.

487. *Actions on deeds, etc., under seal.*—All actions of debt for rent upon an indenture of demise, and all actions of covenant or debt upon any bond or other specialty, must be brought within twenty years.[b] [2]

488. *Actions on simple contracts, etc.*—All actions of debt for arrears of rent on a lease not under seal; all actions of trover, detinue, and replevin; all actions of account and on the case (and these include almost every action competent), must be brought within six years after the cause of action arose.[c] Actions for debt under an award, where the submission is not by specialty, must also be brought

[a] 3 Geo. II. c. 24; as to set off in equity, see *Rawson* v. *Samuel*, Cr. and Ph. 72; *Gordon* v. *Pym*, 3 Hare, 223.

[b] 3 & 4 W. IV. c. 42, § 3.

[c] 21 Jas. I. c. 16, § 3; 19 & 20 Vic. c. 97.

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[1] So compensation is allowed on similar grounds; but the same strictness is not observed as to one cause of action being *ex delicto*, and the other *ex contractu*. Stat. 1592, c. 141; Ersk. 3, 4, 15; Bell's Pr. § 573; *Macintyre* v. *Macdonald*, 26 Sc. Jur. 227.

[2] The general period of prescription is forty years, called the long negative prescription, which applies to all actions, and extinguishes the right, as well as the remedy; but there are shorter periods applicable to particular rights and which do not extinguish the rights, but merely prevent their being proved by a particular mode of evidence.

within six years.[a] All actions for penalties, damages, or sums of money, given by statute to a party grieved, must be brought within two years.[b]

489. *Writings in party's handwriting.*—The mere circumstance that the deed or document of debt is written in the handwriting of the party liable, makes no difference whatever, the sole test being whether it is under seal or not.[1]

490. Actions as to the sale of goods, hiring, loan, deposit, and pledge, are included under the head of actions of debt, or for breach of contract mentioned above,[c] and must be brought within six years, unless the contract is under seal.[2]

491. Actions against sureties also resolve into ordinary actions on simple contract,[d] or on contracts under seal,[e] [3] respectively, according to the nature of the writing.

492. Actions for workman's or servant's wages, for tradesman's accounts, for solicitor's bills of costs, for rent due on verbal lease, etc.,

[a] 3 & 4 W. IV. c. 42, § 3.
[b] *Ibid.*
[c] *Ante*, § 488.
[d] *Ante*, § 487.
[e] *Ante*, § 488.

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[1] *Contra;* a special statute applies to holograph missive letters and holograph bonds and subscriptions in compt books, which prescribe in twenty years. Stat. 1669, c. 9. This is called the vicennial prescription. Ersk. 3, 7, 26; Napier on Prescrip. 866; *Mowat* v. *Banks*, 28 Sc. Jur. 542. But it is still competent within forty years to prove the debt by the defender's oath.

[2] *Contra;* a five years', or quinquennial limitation applies to all bargains concerning moveables, viz., all independent mercantile transactions, exclusive of those transactions embraced in current accounts protected by the triennial prescription and referred to in the next page. Dickson, p. 268. It also applies to sums of money, proveable by witnesses. These bargains generally include sale, hiring, loan, deposit, and pledge of moveables. But the statute is elided, if the debt can be proved, or contract established, within forty years by the writ or oath of the party. Stat. 1669, c. 9; Ersk. 3, 7, 20; Napier on Prescrip. 813; *Hunter* v. *Thomson*, 5 D. B. M. 1285; *Campbell* v. *Grierson*, 10 D. B. M. 361; *M'Kinlay* v. *M'Kinlay*, 14 D. B. M. 162.

[3] *Contra;* the septennial, or seven years' limitation, applies in general to cautioners. "No man binding himself for and with another, conjunctly and severally, in any bond or contract for sums of money, shall be bound for the said sum for more than seven years after the date of the bond;" but the creditor must have notice that such party is expressly or in fact a cautioner. Stat. 1695, c. 5; see *post*, "Guarantee." This limitation extinguishes the right as well as the remedy.

are also generally included under the head of simple contract debts.[a 1]

493. *From what time statute runs.*—The time from which the Statute of Limitations begins to run is not the date of the document or of making the contract, but the time at which a cause of action accrued, *i. e.*, when the contract was broken.[2]

494. *Exceptions in favour of persons under disability.*—If, at the time the cause of action accrues, the person entitled to bring the action is an infant, a *feme covert*, or *non compos mentis*, such persons may bring the action within the same period after the disability ceases.[b 3] There is no exception if the plaintiff was imprisoned or beyond seas;[c] but if the defendant was beyond seas at the time, then the six years are counted from the time of his return.[d] No part of the United Kingdom or the isles of Man, Jersey, or adjacent islands, is deemed to be beyond the seas in this sense.[e]

[a] *Ante*, § 488.

[b] 21 Jas. I. c. 17, § 4; 3 & 4 W. IV. c. 42, § 4; 4 Anne, c. 16, § 19; 19 & 20 Vic. c. 97, § 10, 12.

[c] 19 & 20 Vic. c. 97, § 10.

[d] 4 Anne, c. 16, § 19.

[e] 19 & 20 Vic. c. 97, § 10. As to joint debts, see *post*, "Joint Estates," etc.

IN SCOTLAND.

[1] *Contra;* the three years', or the triennial prescription, applies to these debts under the stat. 1579, c. 83, which describes them as "actions of debt for house maills, men's ordinaries, servants' fees, merchants' accounts, and other the like debts not founded on written obligations." Much litigation has arisen as to the meaning of these words, and what contracts they apply to. The statute has been held to apply to workman's wages, law-agent's (solicitor's) accounts, furnishings to a domestic establishment (goods supplied), servant's wages, and rent due on a lease which is verbal. Napier on Prescrip. 714. The statute is elided by proving the debt by the writ or oath of the party liable, any time within forty years. *Ibid;* Dickson on Evid. 271, *et seq.*

[2] *Contra;* the time is counted in the vicennial limitation from the date of the writing, and not the day of payment, M. 10,992; so in the quinquennial from the making of the bargain, stat. 1669, c. 9; in the septennial, from the date of the bond, stat. 1695, c. 5; but in the triennial prescription the time is counted from the date of the last furnishing. 1 Bell's Com. 331; Ersk. 3, 7, 17; Dickson on Evid. 277. M. 11,087. So the long negative prescription is counted from the day of payment or performance.

[3] The vicennial and quinquennial prescription do not run against minors (1669, c. 9), but the triennial does. M. 11,150; *Campbell* v. *Wilson*, 2 Paton, 193. The long negative prescription does not run against minors. 1617, c. 12; Ersk. 3, 7, 35. There is no deduction for absence abroad, except the plaintiff is in prison there. See 2d Rep. Merc. L. Com. 22.

495. *At what time disability must exist.*—The disability above mentioned must exist at the time the cause of action accrues;[1] for when the statute once begins to run, it cannot be stopped by any disability afterwards supervening.[a]

496. *Acknowledgment, payment of interest, etc.*—If any acknowledgment has been made either by writing signed by the party liable under the deed or specialty, or by his agent, or by part payment, or part satisfaction of principal or interest, the period of the twenty years' limitation is then counted from the date of such or the last acknowledgment, subject to the further exception in favour of persons under disability.[b] [2]

In the case of simple contract debts, no acknowledgment or promise by words only will be evidence of a new or continuing contract so as to take the case out of the statute, but such acknowledgment must be by writing,[3] signed by the party liable or his agent,[c] or there must be part payment of principal or interest.[d] The acknowledgment in writing must be made to the creditor or his agent;[e] [4] and it must be sufficiently specific to warrant the court in inferring therefrom a positive promise to pay.[f] The part payment of principal or interest need not be in money.[g]

[a] *Homfray* v. *Scroope*, 13 Q. B. 509; *Smith* v. *Hill*, 1 Wils. 134.
[b] 3 & 4 W. IV. c. 42, § 5.
[c] 21 Jas. I. c. 16; 9 Geo. IV. c. 14; 19 & 20 Vic. c. 97, § 13.
[d] *Williams* v. *Griffiths*, 2 C. M. R. 48; *Cleave* v. *Jones*, 6 Exch. 578.
[e] *Holland* v. *Clark*, 1 Y. & C. C. C. 151; 2d Rep. Merc. L. Com. 74.
[f] *Williams* v. *Griffiths*, 3 Exch. 335, 584.
[g] *Bodger* v. *Arch*, 10 Exch. 341.

IN SCOTLAND.

[1] *Contra;* the years of disability, when deducted, may occur at any point of the prescriptive period, and the cause of action will be suspended during the time the disability lasts.

[2] So the long negative prescription may be interrupted by an acknowledgment of the debt, provided such acknowledgment is given during the forty years.

[3] *Contra;* the acknowledgment of a debt may be established either by the writing of the debtor, or by his admission on oath of reference. Rep. Merc. L. Com. 147. And a memorandum written by the debtor may in some cases be sufficient, though not signed by him. *Ibid.*

[4] *Contra;* it is not indispensable in all cases that the acknowledgment should be made to the creditor or his agent. Rep. Merc. L. Com. 147. If the acknowledgment be clear, it will be effectual to prove the debt though it contain no promise to pay. *Ibid*, 72.

497. *Within what time acknowledgment given.*—The acknowledgment in writing and signed, which is required to take a case out of the statute, may be given either during the time of limitation,[1] or after it has expired; and a fresh period of limitation runs from such acknowledgment.[2]

498. *Writ to save Statute of Limitations.*—Where the period of limitation has nearly expired, it is always competent to keep the debt alive by issuing a writ of summons, which, however, must either be served within six months thereafter, or must be renewed every six months until service.[a3]

499. *Limitation does not extinguish debt, etc.*—The Statute of Limitations does not extinguish the debt,[4] but merely bars the remedy, provided the defendant properly plead the statute specially as a defence. The debt still continues for other purposes—as, for example, to support a lien in respect of the debt,[b] and to support an action on a subsequent acknowledgment of the debt, without proving any fresh consideration. The limitation of actions to recover land, however, extinguishes the right as well as the remedy.[c]

[a] 15 & 16 Vic. c. 76, § 11.
[b] *Spears* v. *Hartley*, 3 Esp. 81; *Higgins* v. *Scott*, 2 B. & Ad. 413.
[c] See *ante*, § 296.

IN SCOTLAND.

[1] *Contra;* it is always competent within forty years from the breach of a contract, to prove the debt by an acknowledgment or payment of interest or principal, for the right is not extinguished by the long negative prescription until forty years elapse. An acknowledgment of a debt made within the period of short prescription does not elide prescription; but if an acknowledgment be made after the period of short prescription is completed, it will be effectual to prove the debt for forty years thereafter; 2d Rep. Merc. L. Com. 72.

[2] *Contra;* the written acknowledgment of a debt bars the long prescription only. See last note.

[3] So the long negative prescription may be interrupted judicially by raising an action in which the debtor must be cited as a party, or by diligence with which he must be served. The citation need only, however, be renewed every seven years; M. 11,331. The summons in the action must be called in court within a year, otherwise it falls.

[4] *Contra;* the long negative prescription of forty years extinguishes the debt for all purposes; but the minor prescriptions merely cut off one mode of proving the debt, leaving it to be proved in other modes competent.

CHAPTER II.

TORTS.

506. *Torts generally.*—A tort is a wrong independent of contract, and embraces those injuries to the person or property which a civil court will redress. Some cases, however, partake both of contract and tort, and the action may be treated as one arising either ex contractu or ex delicto ; such are some actions of trover and trespass.

507. *Death of wrong-doer.*—The right of action for a tort in general dies with the person who committed it, and no action can be brought at common law against his executor.[a][2]

508. But now by statute, if the tort was committed in respect of another's property within six months preceding the wrong-doer's death, and the action be brought within six months after the representatives have acted, such action may be sustained.[b] There is also an action competent by the custom of England against the executor of an incumbent for dilapidations.[c]

509. *Criminal punishment.*—The criminal prosecution of a party for felony must be *bona fide* attempted by the injured party before he

[a] 1 Saund. 216 *a*. [b] 3 & 4 W. IV. c. 42, § 2.
[c] *Manson* v. *Lambert*, 12 Q. B. 795.

IN SCOTLAND.

[1] A delict is an offence committed with an injurious, fraudulent, or criminal purpose (Bell's Pr. § 544), in other words, a crime; but *quasi* delicts (torts) are remedied only by a civil court.

[2] *Contra ;* the obligation to repair the injury transmits to the representatives of the delinquent *quantum lucrati*, whether proceedings commenced during his life or not. Bell's Pr. § 546 ; Ersk. 3, 1, 15 ; *M'Naughton*, 15 F. C. 199 ; *Davidson* v. *Tulloch*, 32 Sc. Jur. 363.

[3] *Contra ;* there is no limitation other than the ordinary prescription of forty years, except as to actions of spuilzie (trover or detinue for goods) which suffer a triennial prescription. Stat. 1579, c. 81 ; Ersk. 3, 7, 16 ; see *post*, § 515 *n*.

can enforce his civil remedy, but this rule does not apply to misdemeanours.[a]

510. *Damages.*—The damages recoverable in actions of tort are in general confined to the pecuniary loss sustained by the injury, but in certain cases, such as actions for seduction, or for malicious injuries, what are called vindictive damages may be given, that is, whatever sum the jury think proper, on a view of the whole circumstances, so long as the jury are not actuated by any improper motive or wrong principle in making their assessment.[b] [2]

511. *Actions for tort to deceased person and his estate.*—The rule at common law is, that, if a person who has been injured in person or property dies, the right of action to recover damages dies with him—*actio personalis moritur cum persona.*[3] But by statute, an exception was made where the injury was done to the personal estate of the deceased in his lifetime, whereby it became less beneficial to the executor.[c] So by statute, a right of action is given to the executors for injuries to the real estate of their testator, committed in his lifetime, provided such injury was done within six months preceding the death, and provided the action be brought within one year after the death.[d] So by Lord Campbell's Act, an action for injuries resulting in death, caused by the wrongful act, neglect, or default of another, is competent to the wife, husband, parent, or child of the deceased person, but such action must be brought within one year after the death.[e] [4]

[a] 1 Hale P. C. 546; *Crosby* v. *Leng*, 12 East. 409.

[b] *Doe* v. *Filliter*, 13 M. & W. 51; *Chilton* v. *London R. Co.*, 16 M. & W. 212.

[c] 4 Edw. III. c. 7; 15 Edw. III. c. 5; 1 Saund. 217 *n* (1).

[d] 3 & 4 W. IV. c. 42, § 2.

[e] 9 & 10 Vic. c. 93; 27 & 28 Vic. c. 95.

IN SCOTLAND.

[1] So the punishment of the crime does not extinguish the civil remedy in any case, except where the punishment is capital. 1 Hume, Cr. L. 279.

[2] *Contra;* the reparation in all cases includes not merely the pecuniary loss, but also a *solatium* for the injury. Bell's Pr. § 552.

[3] *Contra;* the action for a *solatium* transmits to the personal representatives of the injured party. *Neilson* v. *Roger*, 26 Sc. Jur. 156.

[4] The wife and family can sue in such circumstances, which they do at common law, for assythment, which is a *solatium* for wounded feelings, as well as an indemnification for damages. Bell's Pr. § 2029. Parents may sue, if the child *de facto* supported them; *Weems* v. *Love*, 33 Sc. Jur. 521. Collateral relations cannot sue. *Greenhorn* v. *Addie*, 27 Sc. Jur. 450. The damages are divided, like the goods in communion. *Ibid.*

512. *Seduction.*—The seduction of an unmarried woman, by whatever deceit or misrepresentation effected, is no cause of action at common law, and she herself can recover no damages on that ground.[1] But if she is a servant, her master may sue the seducer for the loss of service, if any, caused by the seduction. A father or mother, as such, has no right of action for the seduction of a daughter, but if he or she can prove some slight acts of service so as to sustain the allegation that she was a servant, the action will lie against the seducer. And though it is absolutely necessary for the parent to prove some loss of service, yet the jury are not confined to give damages for the mere loss of service, but may increase them in respect of the wounded feelings of the parent.[a]

513. *Action for criminal conversation.*—The seduction of a wife was formerly a ground of an action at law by the husband for criminal conversation. Instead thereof, the adulterer may now be made a co-respondent in a suit for divorce, and damages may be awarded against him.[2]

514. *Action for false imprisonment.*—When an action is brought for false imprisonment, it is in the form either of an action of trespass, or an action on the case for malicious prosecution, according to circumstances. In the latter case, the plaintiff must prove malice and want of reasonable and probable cause.[3]

515. *Limitation of actions ex delicto.*—Actions of trespass to land

[a] *Grinnel* v. *Wells*, 7 M. & Gr. 1033; *Howard* v. *Crowther*, 8 M. & W. 603; *Eager* v. *Grimwood*, 1 Exch. 61; *Thompson* v. *Ross*, 5 H. & N. 16. *Griffiths* v. *Fectgen*, 15 C. B. 344;

IN SCOTLAND.

[1] *Contra;* this is a ground of action to the woman, who can sue in her own right, and recover damages for the seduction *per se.* In *Hislop*, 15th July 1696, the judges held that every promise and insinuation of marriage was not enough to found an action, as these are often made very lightly; yet that, on the other hand, debauchery and fraudulent designs should not pass unpunished, and, therefore, they would allow damages against the man who had *dolosé* induced a woman to trust him. M. 13,908; *M'Candy*, 4 S. D. 520; *Walker*, 19 D. B. M. 340.

[2] An action for seduction of a wife was competent either before or after a suit for divorce. Bell's Pr. § 2033: M. 13,919. But the adulterer may now be made a co-defender in an action of divorce. 24 & 25 Vic. c. 86, § 7.

[3] The action for wrongous imprisonment lies on the statute 1701, c. 6, and also at common law. Bell's Pr. § 2035, *et seq.*

or goods must be brought within six years; of trespass to the person, as for assault or battery, within four years; and actions for slander within two years.[a] [1] In the case of the executors of the wrongdoer or injured party being sued, or suing, then the time is further abridged,[b] and so are actions against magistrates and official persons by particular statutes.

CHAPTER III.

SALE OF GOODS.

520. *Statute of Frauds.*—The contract of sale, as regards the mode of establishing its validity by evidence, is regulated chiefly by the Statute of Frauds.[c] If the price is above £10, the contract must be in writing,[2] signed by the party sought to be made liable, or his agent, unless the buyer shall have accepted part of the goods sold, and actually received the same, or have given something in earnest to bind the bargain, or in part payment of the price. If the price is under £10, the contract may be proved by oral evidence.

521. *Accepting and receiving part of the goods.*—A delivery[3] sufficient to take the contract out of the Statute of Frauds may be,

[a] 21 Jas. I. c. 16. [b] See *ante*, § 508, 511.
[c] 29 Ch. II. c. 3; 9 Geo. IV. c. 14, § 7; 2d Rep. Merc. L. Com. p. 41.

IN SCOTLAND.

[1] *Contra;* there is no statutory limitation at all, except in actions on the statute 1701, for wrongous imprisonment, or in a few cases limited by particular statutes. An action of spuilzie prescribes in three years; it is an action for the taking away or intermeddling with moveable goods in the possession of another, without the consent of that other or the order of law (trover and detinue). The delinquent is sued for restitution of the goods or their value, together with violent profits, *i. e.*, such profits (estimated by the pursuer's own oath) as he might have made of the goods while so deprived of them. Yet an action for simple restitution with ordinary damages is competent any time within forty years. Ersk. 3, 7, 16.

[2] *Contra;* writing is not required, whatever be the amount of purchase money. Ersk. 3, 3, 2.

[3] The question of delivery chiefly arises in questions of bankruptcy, as delivery is the criterion of the right of property in the goods. See *post.*

either by actual delivery, or by delivery of the key of the warehouse, or of the bill of lading, or other indicia of property.[a] Acceptance must be in the character of owner, and is compatible with the right of the buyer to object to the quantum or quality of the goods.[b]

522. *Earnest, or part payment.*—The earnest, or part payment, however small, must be actually paid *bona fide*, and not as a mere form.[c]

523. *Writing signed by party or agent.*—The writing must show the names of the contracting parties; also the price, if any was agreed upon, otherwise a reasonable price will be implied.[d] The signature may be printed,[e] or it may be implied in a document purporting to be in the name of the seller.[f] The agent need not be authorised by writing.[g] If an auctioneer write the purchaser's name in his book opposite the lot sold, that is a sufficient signature.[h] So, if a broker, being the common agent of both parties, make the entry in his book, that is a signature; but the bought and sold notes will suffice if there is no such entry.[i]

524. *Offer and acceptance.*—Where A, by post or by an agent, offers to sell on receiving an answer by return of post or by messenger, he cannot retract until the time of return has arrived,[1] the offer being supposed to be continuously made during every instant of time until the offer arrived.[j] But if the offer is made by A to B directly, and B asks for time to consider, say for a day, A is not bound to wait,[2] because it is a *nudum pactum*, and he has received no consideration for waiting.[k] And it seems, if no time for acceptance is men-

[a] *Chaplin* v. *Rodgers*, 1 East, 192; *Mitchel* v. *Ede*, 11 A. & E. 888; *Meredith* v. *Meigh*, 2 E. & B. 364.

[b] *Morton* v. *Tibbett*, 15 Q. B. 428; *Parker* v. *Wallis*, 5 E. & B. 21; *Hunt* v. *Hecht*, 8 Exch. 814.

[c] *Blenkinsop* v. *Clayton*, 7 Taunt. 597; *Walker* v. *Nussey*, 16 M. & W. 302.

[d] *Hoadly* v. *Maclean*, 10 Bing. 482; *Ashcroft* v. *Morrin*, 4 M. & Gr. 450.

[e] *Johnson* v. *Dodgson*, 2 M. & W. 653.

[f] *Lobb* v. *Stanley*, 5 Q. B. 574.

[g] *Chapman* v. *Partridge*, 5 Esp. 256.

[h] *Emmerson* v. *Heelis*, 2 Taunt. 38.

[i] *Goom* v. *Affals*, 6 B. & C. 117; *Thornton* v. *Meux*, 1 M. & M. 43.

[j] *Adams* v. *Lindsell*, 1 B. & Ald. 681.

[k] *Routledge* v. *Grant*, 1 M. & P. 731; 4 Bing. 653; *Cook* v. *Oxley*, 3 T. R. 653.

IN SCOTLAND.

[1] The same. *Dunlop* v. *Higgins*, 6 Bell's Ap. 195.

[2] *Contra*; if A expressly give B a certain time to consider, A would be bound to wait the full time given, because no consideration is necessary to support the contract.

tioned at all, A would not be bound to wait for any length of time;[1] at least not unless, in the case of a letter by post or bearer, B had immediately, or by return of post, intimated his acceptance.[a]

525. *When property in goods passes.*—Goods, which are the subject of sale, may be either specific goods in existence, or goods which are not identified, but are merely intended to be delivered at some future time; or which are not actually made or ready for delivery.[b 2] The property in specific goods ready for delivery passes to the buyer on the making of the contract, and before delivery, whether credit be given for the price or not.[c 3] But if the goods sold are not *in esse*, or not identified, or not completed, then the property does not pass till so completed, and approved of expressly or impliedly by the buyer.[d]

526. *Risk of goods sold.*—The buyer of specific goods is subject to the risk of accidents to the thing bought from the date of the contract; and as to other goods, as soon as the property has passed to the vendee.[e 4]

[a] See *Mozley* v. *Tinkler*, 1 C. M. R. 692.

[b] 9 Geo. IV. c. 14, § 7; *Hibblewhite* v. *M'Morine*, 5 M. & W. 462; *Thackoorseyders* v. *Drondsmell*, 6 Moore, P. C. 300.

[c] 2d Rep. Merc. L. Com. 42; *Tarling* v. *Baxter*, 6 B. & C. 360; *Martindale* v. *Smith*, 1 Q. B. 389.

[d] *Ibid*; *Logan* v. *Le Mesurier*, 6 Moore, P. C. 116; *Gilmour* v. *Supple*, 12 Moore, P. C.

[e] 2d Rep. Merc. L. Com. 42; *Alexander* v. *Gardner*, 1 Bing. N. C. 671; *Fragans* v. *Long*, 4 B. & C. 219; *Richardson* v. *Dunn*, 2 Q. B. 218.

IN SCOTLAND.

[1] *Contra*; A would be bound to wait a reasonable time, and such reasonable time generally means, in mercantile affairs, a very short time. See *Thomson* v. *James*, 18 D. B. M. 1.

[2] Goods not yet in possession of the seller may be sold at common law. Bell's Com. by Shaw, 88.

[3] *Contra*; the right of property in goods sold does not pass until actual or constructive delivery. *Boak* v. *Megget*, 6 D. B. M. 662; 2 Ross, L. C. 547; subject to the qualifications stated *post*, § 527, 528 *n n*.

[4] So the risk is with the buyer, even of specific goods, after the date of the contract, risk not being a mere corollary to the right of property. Stair, 1, 14, 7; Ersk. 3, 3, 7. But if the bargain is to deliver the goods at a particular place, the risk is with the seller, till delivery at that place. *Milne* v. *Miller*, 1st Feb. 1809, F.C. The reason why in general the risk is with the buyer, is said to be that, as the seller's obligation is to deliver the goods sold, if such goods are accidentally destroyed without his fault, his obligation is extinguished. On the other hand, the obligation of the buyer being to pay the price, the destruction of the subject is held to be no defence to an action for payment. *Hausen* v. *Craig*, 31 Sc. Jur. 236.

527. *Creditors of seller of undelivered goods.*—Where specific goods are sold by A, and still remain with him, the creditors of A, the seller, whether suing or about to sue for a debt, can neither attach them by any process known to the law before judgment, nor can the creditors after judgment have execution against them,[1] for they belong to the buyer. On the same principle, if the seller become bankrupt, his assignees, who have no greater right than himself had, cannot detain them, except so far as the seller could.[a]

528. *Creditors of buyer of undelivered goods.*—Where A has sold to B specific goods, but has not delivered them, the creditors of B cannot, by any process of law, before judgment[2] recovered in an action against B, attach those goods in the hands of A; but after obtaining judgment, they can issue execution against those goods, and the sheriff can seize and sell them, subject to any lien which A may have upon them, and pay the proceeds to such judgment creditors.

529. *Goods in hands of a third party.*—Where the goods sold are in the hands of a third party, the property in the goods passes to the purchaser by the contract of sale, as in other cases, though no notice has been given to such third party.[3]

530. *Seller's lien on goods for price.*—If credit be not stipulated for, or the term of credit has expired, the seller has a lien on the goods, and may retain them till the price be paid.[b] But if he take a bill of exchange as a security for the price, he loses the lien; and it does not revive on the dishonour of the bill, if the bill is in the

[a] See *post*, "Bill of Sale," § 540.

[b] 2d Rep. Merc. L. Com. 44; *Mills* v. *Gorton*, 3 C. & M. 504; *Spartali* v. *Benecke*, 10 C. B. 212.

IN SCOTLAND.

[1] The same since 1856; for though the property in the goods still remains in A, no creditor of the seller, after the date of such sale, shall attach such goods, as belonging to the seller, by any diligence or process of law, including sequestration, to the effect of preventing the purchaser, or others in his right, from enforcing delivery of the same. 19 & 20 Vic. c. 60, § 1.

[2] *Contra* since 1856; though the property in the goods does not belong to B, yet the right of B to demand delivery of such goods is, from and after the date of the sale, attachable by or transferable to the creditors of B; and they can arrest the goods in A's hands before decree, as in other cases. 19 & 20 Vic. c. 60, § 1. See *ante*, § 480 *n*, "Arrestment."

[3] *Contra*; intimation must be given by the buyer to the custodier of the goods, over and above actual or constructive delivery. *Eadie* v. *Mackinlay*, 7th Feb. 1815, F. C.

hands of third parties,[a] though it will revive, if the bill is in his own hands.[b]

531.—*General lien.*—But he cannot retain the goods for a general balance arising out of other transactions between him and the buyer.[1]

532. *Sub-sale.*—And if the buyer B before delivery sell the goods to C for value received, C cannot insist on delivery of the goods from the original seller until the price is paid, for the second vendee cannot stand in a better situation than his vendor.[c] [2]

533. *Stoppage in transitu.*—The doctrine of stoppage *in transitu* is an equitable exception[3] to the rule that the vendor's lien for the unpaid price is gone by the goods leaving his possession; and he is entitled to stop them while still in an intermediate agent's hands and undelivered to the purchaser.

534. *Seller re-selling goods.*—If goods are sold on credit, and before delivery to the buyer the seller again sell them, except in market overt, and deliver them to a third party, the first buyer can sue such third party for the goods or their value, whether the latter had notice or not of the first sale;[d] [4] and the first buyer can sue the

[a] *Bunny* v. *Poyntz*, 4 B. & Ad. 568.
[b] *Stevenson* v. *Blakelock*, 1 M. & S. 535; *New* v. *Swain*, 1 Dans. & L. 195.
[c] *Dixon* v. *Yates*, 5 B. & Ad. 313.
[d] 2d Rep. Merc. L. Com. 45.

IN SCOTLAND.

[1] *Contra;* the seller has a right of retention not only for the price, but for his general balance against the buyer, in respect of all other debts due to him by the buyer. *Melrose* v. *Hastie*, 13 D. B. M. 810; 26 Sc. Jur. 319; *Macnaughton* v. *Baird*, 14 D. B. M. 1010. 2d Rep. Merc. L. Com. 44; see *post*, § 595 *n.*

[2] This is the same since 1856, an exception being made expressly by 19 & 20 Vic. c. 60, § 2, in favour of second and subsequent purchasers, to the general rule stated in the last note.

[3] The doctrine of stoppage *in transitu* is not an exception to the general rule. *Morton* v. *Abercromby*, 30 Sc. Jur. 193. For the general rule in the case of all contracts is, that either party may withhold performance of his part of the contract if the other party refuses to perform the corresponding part.

[4] *Contra;* there is no remedy, except an action of damages against the seller, unless the third party establish fraud or collusion. 2d Rep. Merc. L. Com. 45. The reason is that the property in the goods did not pass by the first sale.

seller for damages.[a] Mere non-payment of the price of specific goods sold at the time appointed is not in general a ground for the seller rescinding the contract and re-selling them.[b] But where the buyer refuses to accept or pay for the goods, the seller is entitled to re-sell them, after reasonable notice to the purchaser of his intention to re-sell, in case of the non-removal or non-payment of the goods in a reasonable time.[c]

535. *Actions for not delivering goods sold.*—When the seller has sold specific goods, and wrongfully refuses to deliver them, the buyer can in general only bring an action of damages in a court of law for breach of contract by reason of the non-delivery; yet the Court will, on the plaintiff's application, after judgment in his favour, order execution to issue for the delivery of the specific goods, and thereby indirectly enforce specific performance of the contract.[d] [1] And a court of equity, in peculiar cases, will enforce specific performance, but only on the principle that mere damages do not constitute a sufficient remedy, as where the chattel has a *pretium affectionis*, as an antique horn, tobacco-box, picture, and such like.[e]

536. *Action for price.*—Where the sale is of specific goods, the seller can sue the purchaser for the price of the goods. Where the sale is of goods not specific, the seller, on the buyer refusing to accept the goods, or pay the price, cannot sue for the price,[2] but only for the damages he may have sustained by reason of the non-acceptance of the goods.[f]

537. *Sale by auction.*—On a sale by auction, the seller may employ a person to bid for him up to a fixed sum, to prevent the

[a] *Bowdell* v. *Parsons*, 10 East, 359; *Hochster* v. *De la Tour*, 2 E. & B. 688.
[b] *Milgate* v. *Kebble*, 3 M. & Gr. 100; *Wilmshurst* v. *Bowker*, 7 M. & Gr. 382.
[c] *Maclean* v. *Dunn*, 4 Bing. 722.
[d] 19 & 20 Vic. c. 97, § 2.
[e] See *ante*, § 484.
[f] 2d Rep. Merc. L. Com. 47.

IN SCOTLAND.

[1] *Contra;* the buyer, as a matter of course, sues alternatively for implement or damages. He is entitled to the specific goods if they can be had, and to a decree to that effect *ad factum præstandum;* but if the seller refuses to deliver, or becomes bankrupt, the Court can only substitute damages. 2d Rep. Merc. L. Com. 46.

[2] *Contra;* whether the sale is of goods specific or not, the seller can sue for the price, provided goods according to the contract have been tendered to the purchaser. 2d Rep. Merc. L. Com. 47.

property being sold at an undervalue. And he need not give any previous notice of this intention to the purchasers.[a] [1]

538. *Damages for non-delivery.*—In estimating damages in an action for not delivering goods sold, the buyer is entitled to recover the difference between the contract price, and that which goods of a similar description would cost if bought at the time when the delivery should have taken place. But a rise in the value subsequent to the latter date cannot in general be taken into consideration.[b] [2]

539. *Sale of stolen goods.*—A sale in market overt of stolen goods, gives the purchaser a good title against the real owner, until the latter has prosecuted the thief to conviction; [3] but the real owner can sue an innocent vendee, if the goods are not so bought in market overt, without prosecuting the thief.[c] A market overt in this sense means, in the city of London, every shop, the goods being such as are sold in the ordinary course of dealing there; but out of the city of London, it means only those places and those market days, and hours of the day, pointed out by charter and prescription for each locality.[d]

540. *Bill of sale.*—A person may, by bill of sale, validly sell his goods, and yet retain possession; but such bill of sale will not be good against creditors who issue execution against the seller, unless

[a] 2d Rep. Merc. L. Com. 50; *Flint* v. *Woodin*, 9 Hare, 618.

[b] 2d Rep. Merc. L. Com. 51; *Shaw* v. *Holland*, 15 M. & W. 136; *Westropp* v. *Solomons*, 8 C. B. 345.

[c] Rep. Merc. L. Com. 53; *White* v. *Spettigue*, 13 M. & W. 603; *Lee* v. *Bayes*, 18 C. B. 599.

[d] *Ibid;* 5 Rep. 83 *b*; *Lyons* v. *De Pass*, 11 A. & E. 326.

IN SCOTLAND.

[1] *Contra;* the seller must give notice of his intention to employ a person to bid for him. Bell's Com. by Shaw, 97; *Faulds* v. *Corbet*, 31 Sc. Jur. 313. See *ante*, § 330 *n.*

[2] The value of the thing sold between the time at which the delivery should have taken place and the time of trial, may, in general, be taken into consideration. *Dunlop* v. *Higgins*, 6 Bell's Ap. 195; 2d Rep. Merc. L. Com. 51. But there is no clearly defined rule on the subject. *Baird* v. *Riley*, 28 Sc. Jur. 313.

[3] *Contra;* the theft is called a *vitium reale*, and inheres in the goods, following them into whose hands soever they may go. Bell's Pr. § 1320; 1 Bell's Ill. 416. Hence the real owner can recover them from any innocent buyer.

the bill of sale has been duly registered [1] before the sheriff seize the goods.[a]

541. *Sale of furniture, etc., by tenant of a house.*—A tenant may sell his furniture, stock, or other goods in his house, during the currency of the term, and before the time of payment of rent has arrived, and the landlord's power of distress cannot affect the sale in respect of rent not yet due.[2] Hence, if no rent is yet due, he may, the day before it becomes due, sell all his goods, the landlord having no power to interfere.[b] And even after rent is due, the sale will be good, if made *bona fide* and for valuable consideration to a party not privy to the fraud, before the landlord seizes them under the distress.[c]

542. *Proof of payment.*—Payment of the price of goods may be proved by oral as well as any other legal evidence.[d] [3]

543. *Goods sold before execution against seller.*—Since 1856, no writ of *fi. fa.*, or other writ of execution, and no writ of attachment against the goods of a seller shall prejudice the title of a purchaser *bona fide* and for valuable consideration, before the actual seizure or attachment of such goods under the writ; provided the purchaser had not, at the time of the sale, notice of such writ being delivered to the sheriff.[e] [4]

544. *Implied warranty.*—There is no implied warranty in a sale

[a] 17 & 18 Vic. c. 30, § 1.
[b] See *ante*, § 461.
[c] 11 Geo. II. c. 19, § 2.
[d] See *ante*, § 462.
[e] 19 & 20 Vic. c. 97, § 1.

IN SCOTLAND.

[1] There is no registration required in such circumstances, and creditors of the seller cannot, by any diligence or process of law, including sequestration, attach the goods. 19 & 20 Vic. c. 60, § 1; see *ante*, § 527, 528 *n n*.

[2] *Contra;* the landlord's hypothec attaches on the goods from the commencement of the tenancy, and (like a maritime lien in E. to which possession is not necessary) follows the goods for a certain time. The hypothec may be made effectual by an action raised within three months after the last conventional term of payment of the rent in each year. See *ante*, § 407 *n*.

[3] *Contra;* it is only proveable by the writ or oath of the seller, unless in cases under £8 : 6 : 8, or where it was a ready money transaction. See *ante*, § 461 *n*.

[4] The same. The issuing of a precept of poinding and the execution of a charge for payment, until followed by an execution of poinding, does not prevent a sale of goods by the debtor. Rep. Merc. L. Com. 48.

of goods that they will be fit for the purpose intended, unless specially sold for that purpose.[1]

CHAPTER IV.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

546. *Parties to bills.*—If an infant (*i.e.*, a person under 21) be a party to a bill or note, he cannot be sued thereon during minority; nor after majority, unless he has ratified or confirmed the contract by some writing signed by himself.[a] [2] And it makes no difference, that the bill was granted in the way of business or for necessaries.

A married woman, though carrying on trade, cannot, except in the city of London, be sued on a bill or note given in the course of such trade.[b] [3] It makes no difference, that she lives separate from her husband, except she is judicially separated, or has obtained an order protecting her property,[c] or except he is transported beyond the seas.

Directors of joint-stock companies, who accept bills for the company in their own names, are in general personally liable;[d] but not if the company is limited, and it is so stated in the bill.[e] An

[a] *Williams* v. *Harrison*, Holt, 359; 9 Geo. IV. c. 14, § 5; See *post*, "Infants."
[b] See *post*, "Marriage."
[c] 20 & 21 Vic. c. 85, § 26.
[d] Byles on Bills, 60.
[e] 19 & 20 Vic. c. 47, § 43; 20 & 21 Vic. c. 14, c. 49, c. 80.

IN SCOTLAND.

[1] The same since 1856. If, at the time of sale, the seller was without knowledge, that the goods were defective or of bad quality, the goods, with all faults, shall be at the purchaser's risk, unless the goods have been expressly sold for a specified and particular purpose. 19 & 20 Vic. c. 60, § 5.

[2] *Contra;* a minor is liable on a bill of exchange, if he is in business, and granted the bill or note in course thereof; and he is also liable on a bill given for furnishings. See *post*, Part IV. "Infant."

[3] *Contra;* a married woman, who is a party to a bill, and is carrying on business apart from him, is liable in all cases if her husband is abroad; 2d Rep. Merc. L. Com. 59; *Orme* v. *Differs*, 12 S. D. 149; 1 Fraser, D. R. 259; but not if she is judicially separated. *Ib.* 261.

authority to directors to make bargains and contracts for their company, does not in general authorize the directors to draw bills.[a 1]

Official persons representing public bodies, are in general personally liable on bills or notes made for such bodies.[b 2]

547. *Inland bills.*—All bills are now deemed to be inland, which are drawn in any part of the United Kingdom, the Islands of Man, Guernsey, Jersey, Alderney, Sark, and islands adjacent thereto, and made payable in, or drawn upon any person resident in any part of the said United Kingdom or islands.[c 3]

548. *Signature.*—A party may sign the bill by his mark, or by the hand of another person, or by initials, though this is not stated *ex facie* of the bill. But when an action is brought against such party, and he denies the signature, witnesses must be called who were present when the mark or authority was given.[4] The summary remedy, or privileged action, is competent on these as on other bills.[d 5]

When the acceptor accepts a bill, he generally does so by writing his name across the face of the bill under the word "accepted."[6] And it is now necessary for the acceptor of both inland and foreign bills to sign his name himself, or by some person duly authorised.[e]

[a] Byles on Bills, 60; *Harmer* v. *Steele*, 4 Exch. 9.
[b] *Rew* v. *Petit*, 1 A. & E. 196; 3 N. & M. 456.
[c] 19 & 20 Vic. c. 97, § 7.
[d] 18 & 19 Vic. c. 67.
[e] 19 & 20 Vic. c. 97, § 6.

IN SCOTLAND.

[1] It seems the same.

[2] *Contra;* corporations may grant bills or notes by the subscription of their office-bearers, and the latter do not bind themselves personally. Thomson on Bills, 216 (2d ed.)

[3] The same since 1856 by 19 & 20 Vic. c. 60, § 12.

[4] The same, though witnesses generally attest the mark by signing their names. M. 16,802; *Craigie* v. *Scobie*, 10 S. D. 510. And some evidence at the trial must be given of a custom on the part of the party to sign by his mark or initials.

[5] *Contra;* if the signature is by mark, unless it is authenticated by two notaries and four witnesses, summary diligence is not competent. M. 1419; M. 16,985; 5 Br. Sup. 887.

[6] *Contra;* the acceptor's signature is usually written under that of the drawer on the face of the bill. The word "accepted" is not usually added. The signature, which is necessary, may be by the acceptor himself or an agent duly authorised. 19 & 20 Vic. c. 60, § 11.

Bills of Exchange and Promissory Notes.

549. *Proof of date.*—The date on a bill or note is merely *prima facie* evidence of the true date, and oral evidence may be given to rebut the date stated in the bill.[1]

550. *Proof of no consideration.*—Contrary to the general rule applicable to simple contracts, a good consideration is presumed in bills of exchange, and the holder need not in general allege or prove it.[2]

551. The defendant cannot put the plaintiff on proof of the consideration, unless he, the defendant, can make out a *prima facie* case against him, by showing that the bill was obtained from the defendant or some intermediate party by means of fraud or duress, or by showing the bill was lost, or was originally given for an illegal consideration. And in such cases the defendant can prove his case by parole evidence.[3]

552. But as between privies, *i. e.*, immediate parties to the bill, such as the drawer and acceptor, the payee and the drawer or maker, the indorsee and immediate indorser, etc., the absence or failure of the consideration is a good defence to the action;[a] and may be proved by parole evidence.[4]

[a] Byles on Bills, 109.

IN SCOTLAND.

[1] *Contra;* in the absence of fraud alleged, and if the sum exceeds £8 : 6 : 8, the date can only be supplied by written evidence. 2d Rep. Merc. L. Com. 55; (Ersk. 3, 2, 25; Bell's Com. by Shaw, 305; 1 Ross, L. C. 182; Thomson, 60); but if there is no date, oral evidence of the true date of issue is admissible. 19 & 20 Vic. c. 60, § 10.

[2] It is the general rule, that an adequate consideration is presumed in all contracts, bills included.

[3] Formerly want of value as to a bill lost, stolen, or got by fraud, could only be proved by some writing signed by the holder, or it must have been admitted by him when referred to his oath; and the same must have been proved as to the intermediate holders, if any. M. 1484; 1 Ross, L. C. C. 144, 229; *Paterson* v. *Govan*, 29 Sc. Jur. 8. Yet a judicial examination of the holder would, in the first instance, be ordered in suspicious cases (*Wilson* v. *Pollock*, 13th Nov. 1827; *Hunter* v. *George*, 7 W. S. 333; *Miller* v. *Keppen*, 9th Dec. 1848); or the above rule would be relaxed. *Bannatyne* v. *Wilson*, 29 Sc. Jur. 99. But now it lies on the holder of bills so obtained to prove that he gave value, and he may prove that fact by parole evidence. 19 & 20 Vic. c. 60, § 15.

[4] *Contra;* it can only be proved by the writ or oath of the pursuer. *Peat* v. *Wilson*, 6 S. D. 225; *Cargill* v. *Gould*, 14 D. B. M. 485. And see last note.

553. As between remote parties, such as payee and acceptor, indorsee and acceptor, etc., D, the defendant, in order to set up a defence of no consideration, must not only be in a position, as stated above, to put P, the plaintiff, on the proof of the consideration which P gave; but D must also prove that he, D himself, got no consideration for his liability. Both of these facts may be proved by parole evidence.[1]

554. *Stranger accepting.*—A person cannot in general accept a bill, who is not named in the address.[a] But there is an exception in the case of a stranger, accepting *supra* protest, for the honour of one of the parties.[b] [2]

556. *Duress.*—Where a bill or note has been obtained by duress, it is not void,[3] but a *bona fide* holder can be put to prove that he gave value; and if he does so, he will recover.[c]

557. *Protest.*—The form of a protest of a foreign bill is the same *mutatis mutandis* for non-acceptance and non-payment. Where no notary public is near the place, any respectable person, with two witnesses, may protest the bill.[d] [4] And where a notary protests the bill, no witnesses are necessary, but at the trial he must be called as a witness to prove the protest.[5] The protest need not be registered for any purpose.[6]

558. Besides the protest for non-acceptance and non-payment,

[a] *Nichols* v. *Diamond*, 9 Exch. 157; *Davis* v. *Clark*, 6 Q. B. 16; *Mure* v. *Charles*, 5 E. & B. 978.

[b] *Ibid*; *Jenkins* v. *Hutchinson*, 13 Q. B. 744.

[c] *Kearns* v. *Durell*, 6 C. B. 596.

[d] Bayley on Bills, 210; Anon. 12 Mod. 345.

IN SCOTLAND.

[1] *Contra;* these things can only be proved by the writ or oath of the pursuer.

[2] It seems he will be liable jointly with the other acceptor. *Macara* v. *Watson*, 2 S. D. 360; Thomson on Bills, 75, 77, 183.

[3] *Contra;* a bill obtained by force and fear has been treated as void, even in the hands of an onerous indorsee. *Wilcox* v. *Callender*, 26th Nov. 1787; 1 Ross, L. C. C. 151; but see 19 & 20 Vic. c. 60, § 15.

[4] *Contra;* a notary is necessary. M. 1518.

[5] *Contra;* witnesses are necessary; but at the trial the instrument of protest proves itself.

[6] *Contra;* for the purpose of summary diligence a notarial protest is necessary. But since 1856 a notarial protest of an inland bill of exchange is not necessary in order to preserve recourse against the drawer or indorser respectively, and it is sufficient to prove presentment and dishonour by other competent evidence, either written or parole. 19 & 20 Vic. c. 97, § 60.

there is another protest called a protest for better security, which is used when the acceptor's credit is publicly impeached, and which enables a second person to accept for honour, which otherwise a stranger cannot do.[1]

559. *Death of drawer of check.*—The drawer's death is a countermand[2] of a banker's authority to pay the check; yet if it is paid before the banker hears of the death, the payment is good.[a]

560. *Transfer.*—A bill or note is not negotiable, unless it be expressed to be payable either to bearer or to order. If it is payable to bearer, it is assignable by mere delivery; if payable to order, it is assignable by indorsement only.[3]

561. *Effect of presenting bill.*—A bill of exchange, when presented and accepted, has not the effect of charging specific funds of the drawer in the hands of the drawee.[b] [4]

562. *Day of payment a holiday.*—Christmas Day[5] and Good Friday,[5] and all days appointed by proclamation for solemn feasts and thanksgivings, are treated as Sundays, and payment must be made on the preceding day, of bills falling due on those days.[c]

563. *Receipt on bill.*—A receipt on the back of the bill or note is *prima facie* evidence of payment by the acceptor.[d] But it must[6]

[a] *Tate* v. *Hilbert*, 2 Ves. 118.

[b] 2d Rep. Merc. L. Com. 56; *Laycock* v. *Johnson*, 6 Hare, 199.

[c] *Tassell* v. *Lewis*, 1 L. Raym. 743; 39 & 40 Geo. III. c. 42; 7 & 8 Geo. IV. c. 15; 6 & 7 W. IV. c. 58, § 2.

[d] *Pfiel* v. *Vanbatenberg*, 2 Camp. 439.

IN SCOTLAND.

[1] Not used, as any stranger can accept the bill, and make himself liable. See *ante*, § 554 *n.*

[2] It seems the same.

[3] *Contra;* it is negotiable without either of those words. M. 1446; Rep. Merc. L. Com. 63. So a Scotch bill without those words is transferable by indorsation in England, so as to enable the transferee to sue in his own name in Scotland. *Robertson* v. *Burdekin*, 6 D. B. M. 17.

[4] *Contra;* acceptance operates as an assignation to the payee of the drawer's funds in the drawee's hands to the amount of the bill; and so does presentment for acceptance. 1 Bell's Ill. 479-480; *Brierly* v. *Macintosh*, 5 Bell's Ap. 1; *Watts* v. *Pinkney*, 16 D. B. M. 279; 2d Rep. Merc. L. Com. 56.

[5] *Contra*, so far as regards Christmas Day and Good Friday.

[6] *Contra;* if there is a receipt on the back of the bill, it operates as an extinction of the debt in favour of the acceptor, and the contrary can only be proved by the acceptor's writ or oath. Thomson on Bills, 355; *Martin* v. *Whyte*, 27 Sc. Jur. 44.

be proved to be in the handwriting of a person entitled to demand payment.[a]

564. *Discharge.*—In order to prove the discharge of any party to a bill or note before it becomes payable, it is sufficient to prove by parole evidence [1] an express renunciation of his claim on the part of the holder.[b]

565. *Interest.*—Interest is allowed on bills and notes by usage of trade as well as by statute; but the plaintiff is not of right entitled to interest, unless it is expressly stated in the instrument to be payable.[c] [2] Hence, though juries generally add the interest to their verdict, they may give none, or a reduced rate.[d] If the action is summary under the recent statute, the plaintiff may add the interest on signing judgment. The interest claimable runs only in both cases to the date of the judgment being signed; [3] but by statute all judgment debts also bear interest till paid. It is necessary to produce the bill at the trial to entitle the plaintiff to interest, otherwise he will be allowed interest only from the date of the writ, which is the commencement of the action.[e]

566. *Lost bill.*—If a bill, note, or check, negotiable by indorsement or delivery, be lost or destroyed, the loser cannot, at common law, sue either of the parties liable on the bill, nor can he sue on the consideration.[f] But relief was allowed in equity on an indemnity being given; and now also at common law the loss shall not be set up as a defence, provided an indemnity is tendered.[g] [4]

567. *Register of protested bills.*—There is no register where protested or dishonoured bills of exchange and promissory-notes can be

[a] Byles on Bills, 198, 387.
[b] *Foster* v. *Dawber*, 6 Exch. 839.
[c] 3 & 4 W. IV. c. 42, § 28; *Florence* v. *Jennings*, 2 C. B. N. S. 454.
[d] *Ibid*; *Cameron* v. *Smith*, 2 B. & Ald. 308; *Page* v. *Newman*, 9 B. & C. 378.
[e] *Hutton* v. *Ward*, 15 Q. B. 26.
[f] *Crowe* v. *Clay*, 9 Exch. 604.
[g] 17 & 18 Vic. c. 125, § 87.

IN SCOTLAND.

[1] *Contra;* express discharge of any party to a bill or note from liability upon it can only be proved by the holder's writ or oath. *Martin* v. *Smith*, 27 Sc. Jur. 45.

[2] *Contra;* it is due of right at common law and also by statutes 1681, c. 20; 1696, c. 36; 12 Geo. III. c. 72; *Brown* v. *Brown*, 4 W. S. 28.

[3] *Contra;* interest is due up to and after decree until payment.

[4] It seems the same. It has been said an action of proving the tenor of a bill was a matter of great delicacy, and should not be permitted except on strong grounds. *M'Farlane* v. *M'Nee*, 4 S. D. 509.

recorded, so as to convert them into warrants of attorney, on which judgment can be at once entered up and execution issued.[1]

568. *Actions on bills privileged.*—But actions on bills or notes are so far privileged that, if the writ of summons is in a certain form, the defendant is not allowed to plead a defence, unless he can get the leave of a judge to do so, and if he fails to satisfy a judge that he has a good defence on the merits, judgment may be signed, and execution issued, in twelve days.[a 2]

569. *Limitation of actions on bills.*—An action must be brought on the bill or note, as on any other simple contract, within six years[3] from the time it was payable, unless the party has revived the debt by acknowledgment, or by part payment of principal or interest.[b] Such acknowledgment (which must be in writing, signed by the party or his agent duly authorised [c]), if made within[4] the six years, revives

[a] 18 & 19 Vic. c. 67.

[b] 21 Ja. I. c. 16; and see *ante*, § 488. [c] 9 Geo. IV. c. 14; 19 & 20 Vic. c. 97, § 13.

IN SCOTLAND.

[1] *Contra;* summary execution may be had upon foreign and inland bills and notes for non-payment, as well as non-acceptance, against the drawers and indorsers, as well as against the acceptors, conjunctly and severally, Stats. 1681, c. 20; 1696, c. 36; 23 Geo. III. c. 18, § 55. The protest is registered, and an extract (or office copy) given out, containing a warrant to charge the party liable to pay in six days, failing which a warrant for poinding or imprisonment issues (*i. e.*, final execution of fi. fa. or ca. sa.). 1 & 2 Vic. c. 114. This is called summary diligence on the bill or note. But the protest for non-payment must be registered within six months from the day of payment. A protest for non-acceptance must be registered within six months from the date of the bill to authorise execution against the drawer or indorsers. Moreover, if the bill is *ex facie* erased or signed by initials, or blank as to date, the summary remedy is incompetent, and an ordinary action must be raised. The only mode of suspending summary diligence is by finding caution for the debt and costs (*i. e.* giving security).

[2] The same remedy by summary diligence. See last note.

[3] The period is also six years, and is called the sexennial prescription or limitation (12 Geo. III. c. 72, § 37, 39; 23 Geo. III. c. 18, § 55), subject to the proviso in the next note.

[4] *Contra;* an acknowledgment of the debt made during the six years is inoperative as regards the sexennial prescription (*Ferguson* v. *Bethune*, 7th Mar. 1817, F. C.), and cannot revive or perpetuate the legal existence of the bill beyond the six years; but after the expiration of the six years, it is competent to raise an action for the debt, for which the bill or note was granted, and to prove that the sum is owing by any other writing or by the oath of the debtor. 2d Rep. Merc. L. Com. 60.

the debt for six years more from the date of such acknowledgment. If an acknowledgment has been made after the six years, the right of action is also revived for six years more after its date.[1] The Statute of Limitations is only a bar to the action, if specially pleaded. And if a party chooses, after the statute has run, to pay the bill, he cannot afterwards recover back the money so paid.

570. *No remedy after six years.*—If no such acknowledgment has been made within or after the six years, no action is competent to recover the debt for which the bill or note was given,[2] provided the Statute of Limitations is properly pleaded.

571. *Disabilities.*—The statute does not run against infant plaintiffs, provided the disability existed at the time[3] the cause of action accrued; for when the statute once begins to run, no supervening disability will stop it.[a] If the person entitled to sue is beyond the seas, or imprisoned, when the right accrues, he is not, since 1856, entitled to any further time on that account, and the statute runs against him.[b] [4]

572. But if the defendant or person liable on the bill is beyond seas at the time the action accrues, the plaintiff is entitled to sue within six years after such defendant's return.[c] [5] Absence however in Scotland, Ireland, the Isle of Man, Jersey, and the Channel Islands, is not absence beyond seas in this sense.[d]

573. *Overdue bill.*—The indorsee of an overdue bill takes it subject to all the equities and objections to which it was subject in the hands of the indorser, as far as they are intrinsic to the bill, but not subject to collateral matter, such as a right of set off against the former holder.[e] [6]

[a] See *ante*, § 495.
[b] 19 & 20 Vic. c. 97, § 10.
[c] 4 & 5 Anne, c. 16, § 19.
[d] 19 & 20 Vic. c. 97, § 12.
[e] 2d Rep. Merc. L. Com. 66.

IN SCOTLAND.

[1] *Contra*, for forty years. See last note.

[2] *Contra;* provided the pursuer can prove, by the writ or oath of the party, non-payment; and he may sue in that case any time within forty years from the date of the debt. See stat. *supra;* 2d Rep. Merc. L. Com. 67.

[3] *Contra; the years of minority of the person having the present right to sue are not counted, whether they exist at the commencement or middle of the six years.*

[4] *So it was always as to the sexennial limitation.*

[5] *Contra;* the absence of the defender does not save the sexennial prescription.

[6] The same since 1856 by 19 and 20 Vic. c. 60, § 16.

CHAPTER V.

SHIPPING—INSURANCE—COPYRIGHT.

SHIPPING.

579. *Joint owners of ship.*—Where part owners of a ship disagree as to its employment, the majority are entitled to decide the point. And the minority cannot compel a sale;[1] but they can arrest the ship in security, and thereby compel the majority to find security, either to bring back the ship, or to pay the minority the value of their shares, the minority in that case having no share in the undertaking.[a]

580. *Freighter's lien on ship.*—The freighter has no lien on the ship in respect of his goods sold, lost, or injured during the voyage.[2]

581. *Seamen's lien for wages.*—Seamen have no lien for their wages on the freight after the cargo has been removed from the ship.[b] [3]

582. *Collision of ships.*—Where a ship A causes a collision with ship B, the owners of B have a maritime lien upon the ship A for the damage thereby caused.[c] [4]

[a] 2d Rep. Merc. L. Com. 74; The Apollo, 1 Hagg. 306; *Strelly* v. *Wilson*, 1 Vern. 297; *Barnardiston* v. *Chapman*, 4 East, 121.

[b] Rep. Merc. L. Com. 75.

[c] *Harmer* v. *Bell*, 7 Moore, P. C. C. 267.

IN SCOTLAND.

[1] *Contra;* the minority have a remedy by an action of sett and sale, whereby they can insist on the majority either buying the shares of the minority, or selling their own shares. Stair, 1, 16, 4; Ersk. 3, 3, 56; 2d Rep. Merc. L. Com. 74.

[2] *Contra;* he has not only a lien, but a hypothec on the ship in such a case. Bell's Com. by Shaw, 440.

[3] *Contra;* they have a hypothec over the freight, which is a lien subsisting without possession. Ersk. 3, 2, 34; 2d Rep. Merc. L. Com. 75.

[4] *Contra.* Bell's Com. by Shaw, 440, 467.

INSURANCE.

585. *Assignment of fire policy.*—A policy of fire insurance is not assignable at common law without the consent of the insurer; but it is assignable in equity like any other *chose in action.*[a] [1]

586. *Condition precedent to right of action.*—Where the policy contains a condition that the loss-money should not be recoverable until a certificate of character from the minister of the parish should be obtained by the insured, this is treated as a condition precedent, and no action can be brought without the certificate, even though the minister wrongfully refuse to give it.[b] [2]

587. *Floating policy on goods in trust.*—Where a carrier or warehouseman insures goods "held by him in trust," he can recover the full value of the goods; and it seems, after paying his own charges, he is a trustee of the surplus for the real owners of the goods.[c] [3]

COPYRIGHT.

590. *At common law.*—An author has no copyright at common law, and his rights depend entirely on statute.[e] [4]

[a] *Lynch* v. *Dalzell*, 4 Bro. P. C. 431; see *ante*, § 476; *Saddler's Co.* v. *Badcock*, 2 Atk. 545.

[b] *Worsley* v. *Wood*, 6 T. R. 710; *Levy* v. *Baillie*, 7 Bing. 349.

[c] *Waters* v. *Monarch Life Ins. Co.* 5 E. & B. 870.

[d] *Jeffreys* v. *Boosey*, 4 H. L. Cas. 815.

IN SCOTLAND.

[1] In general all debts are assignable, so as to allow the assignee to sue in his own name. See *ante*, § 476 *n.*

[2] *Contra;* this is not a condition precedent, if the minister wilfully refuses to give the certificate.

[3] It seems the same; but see dicta in *Dalglish* v. *Buchanan*, 26 Sc. Jur. 160.

[4] The same, and under the same statutes. 8 Anne, c. 19; 5 & 6 Vic. c. 45.

CHAPTER VI.

LIEN—PLEDGE—DEPOSIT—BAILMENTS.

594. *Lien.*—Lien is a right vested in a person, who has the possession, actual or constructive, of a thing, but not the property, to retain the thing, in respect of some pecuniary claim. Possession is essential to a lien; but in maritime liens possession is not required.[a] [1] A lien in general is waived by taking a security for the debt, as a bill of exchange payable at a future day; [2] though, on dishonour of the bill, if possession continues, the lien revives.[b]

595. *Liens general and particular.*—Liens are known as general and particular. General liens are where the person claims to retain the goods in respect of a general balance of accounts, *i. e.*, debts due not only in respect of the thing itself, but due on any other ground. Particular liens are where the person claims in respect of money or labour expended upon the particular goods.

596. *General liens.*—General liens are unknown and odious to the common law.[3] Yet there are several instances of general liens,

[a] *Harmer* v. *Bell*, 7 Moore, P. C. C. 267. [b] *Stevenson* v. *Blacklock*, 1 M. & S. 535.

IN SCOTLAND.

[1] This is generally called hypothec, and is not confined to maritime cases. There are some tacit or implied hypothecs, as the landlord's hypothec on crops and furniture (see *ante*, § 407 *n*)—a law agent's, on the expenses recovered in a suit (see *post*, "Solicitors")—and a superior's hypothec, for his feu-duties (see *ante*, § 179 *n*). Hypothec thus differs from retention or lien, in the former not requiring possession.

[2] *Contra;* the lien is not waived by taking a bill as the security, unless there was an express or implied contract to that effect. See *Miller* v. *M'Nair*, 14 D. B. M. 955.

[3] *Contra;* a general lien or retention is the common law in all cases where the possession was acquired by an unlimited title, and also exists by usage or agreement; but the special agreement cuts down the common law general lien, in many cases, into special (*i. e.* particular) lien or special retention. See *Sibbald* v. *Gibson*, 25 Sc. Jur. 143; *Forbes* v. *Robb*, 31 Sc. Jur. 50; *Lawrie* v. *Anderson*, 25 Sc. Jur. 226; *Hamilton* v. *Western Bank*, 29 Sc. Jur. 77. In the case of *Forbes* v. *Robb*, 31 Sc. Jur. 52, L. J. C.

which have grown up out of inveterate usage of trade, or the course of dealing. Thus attorneys, bankers, calico-printers, dyers, and factors, have a general lien on the monies, papers, and goods of their clients and customers, provided such monies, papers, and goods, come into their hands in the ordinary course of business. As to some of these, the usage is confined to particular localities where the trade is carried on.[a]

598.—*Pledgee has no general lien*—Where A pledges property with B for a certain debt, B has no lien[1] on that property in respect of any other debts due to him by A, and not specifically charged on such property.[b]

599. *Livery stabler.*—A livery stable keeper has no lien on the horse kept at livery for its keep, for the nature of the contract, which implies that the horse be given up when the owner requires, is inconsistent with such lien.[c] [2] So an agister of milch cows has no lien upon these for the agistment or hire. [d] [3]

600. *Future advances on real property.*—A security for debts to be afterwards incurred, of indefinite amount, may be effectually created

[a] *Holderness* v. *Collinson*, 7 B. & C. 212.
[b] 2d Rep. Merc. L. Com. 76.
[c] *Judson* v. *Etheridge*, 1 C. & M. 743.
[d] *Jackson* v. *Cummins*, 5 M. & W. 342.

IN SCOTLAND.

Inglis thus stated the result of the recent authorities,—"In every case of retention, the first and most important inquiry is, what is the title on which the party has attained the possession which he proposes to hold till his debt is paid; for this title of possession furnishes the precise measure of the right of retention. If the title of possession be unlimited as a title of property, the party is entitled to retain, till every debt, due to him by the party demanding delivery of the subject, is paid. If his title be limited, he can retain only for the payment of that particular debt which is secured by his possession. This is very well settled law. But the whole of this subject received the most thorough consideration in two recent cases, of which the one (*Melrose* v. *Hastie*, 12 D. B. M. 665) afforded an excellent example of an absolute and unlimited title of possession, and the other (*Lawrie* v. *Anderson*, 15 D. B. M. 404) an equally instructive example of a limited title of possession." See as to retention in sale, *ante*, § 531; in pledge, *post*, § 598.

[1] *Contra;* it has been said, that the pledgee has a right of general retention for all other debts due to him from the pledger, though not specifically charged on the subject pledged. 2d Rep. Merc. L. Com. 76. But see *Forbes* v. *Robb*, 31 Sc. Jur. 50, and the note preceding.

[2] *Contra;* this is not an exception.

[3] *Contra;* milch cows may be detained for their grassmail. Ersk. 1, 6, 3.

over real property; and no limitation of the amount need be declared.[a] [1]

601. *Sale of pledge.*—A pledgee of personal chattels has in general an implied power of sale, *i. e.*, he is entitled, after giving reasonable notice to the pledger to pay the debt, and after default, to sell the goods and apply the proceeds in payment. And he requires no authority of any judge to enable him to do so.[b] [2]

602. *Gratuitous bailment.*—A gratuitous bailment (such as deposit, mandate, commodatum, or an agreement for the gratuitous carriage of goods) which the bailee has agreed to, but not begun to act upon, is no ground of action,[3] for a consideration is wanting. If, however, a party, who has undertaken gratuitously to perform work for another, has once commenced the work, he will be liable for gross negligence or any wrongful act injurious to the promisee.[c]

603. *Carriers' loss by fire.*—Carriers are, at common law, liable for the loss by accidental fire of goods in their care.[d] [4] They are in the situation of insurers of the goods, and are answerable for every loss or damage happening to them while in their custody from whatever cause, except the act of God (such as a tempest), or the act of the Queen's enemies.[e] [5]

604. *Deposit.*—A depositor is not impliedly bound to reimburse the depositary for extraordinary expenses which the latter may have been put to in the preservation of the thing deposited; though slight

[a] See *ante*, § 97, 120.

[b] *Pothonier* v. *Dawson*, Holt, 385; *Smart* v. *Sanders*, 3 C. B. 401, 5 C. B. 915; *Lochwood* v. *Ewer*, 9 Mod. 278.

[c] *Wilson* v. *Brett*, 11 M. & W. 113; *Balfe* v. *West*, 13 C. B. 466.

[d] *Forward* v. *Pittard*, 1 T. R. 27; *Hyde* v. *Trent Navigation*, 5 T. R. 389.

[e] *Dale* v. *Hall*, 1 Wils. 281; 1 Inst. 89.

IN SCOTLAND.

[1] *Contra;* securities over land for an indefinite or fluctuating sum cannot be created, except it be a cash credit or other bond specifying a fixed sum as a limit to cover advances. 2d Rep. Merc. L. Com. 76; see *ante*, § 97 *n.*; 120 *n.*

[2] *Contra;* the pledgee cannot sell the pledge without the authority of the judge ordinary or sheriff, who, on petition, grants warrant to sell, after calling the pledger as a party. Stair 1, 13, 11; Ersk. 3, 1, 33.

[3] *Contra;* the consideration makes no difference.

[4] The same since 1856 by the Stat. 19 & 20 Vic. c. 60, § 17.

[5] The general rule is the same, being derived from the Roman edict *Nautæ, caupones, Stabularii.* Bell's Pr. § 235.

evidence, such as recognition, will satisfy a jury of the existence of such promise.[1] Much less can the depositary detain [2] the thing deposited for such expenses.

606. *Negligence of hirer.*—Where a thing hired is injured, the *onus* is on the owner to prove negligence in the hirer.[a] [3]

CHAPTER VII.

PRINCIPAL AND AGENT.

610. *Appointment of agent.*—An agent may in general be appointed by parol, even in those cases where the principal can only be bound by writing of the agent, within the 4th and 17th sections of the Statute of Frauds.[b] But for the purpose of creating a freehold or leasehold interest, or any uncertain interest in lands (other than leases under three years), the authority of the agent must be in writing.[c] [4]

611. *Agent of corporation.*—A corporation can appoint their agent only by writing under seal;[d] [5] yet there is an exception in

[a] *Cooper* v. *Barton*, 3 Camp. 5 *n.*
[b] 29 Ch. II. c. 3, § 4; *Coles* v. *Trecothick*, 9 Ves. 234.
[c] 29 Ch. II. c. 3, § 1, 2, 3.
[d] *R.* v. *Biggs*, 3 P. Wms. 425. See *post*, § 649.

IN SCOTLAND.

[1] *Contra*; he must reimburse necessary charges. Ersk. 3, 1, 27.

[2] *Contra*; the depositary may detain the thing deposited, until such extraordinary expenses have been reimbursed. *Ibid.*; *Stuart* v. *Macgregor*, 7 S. D. 622.

[3] *Contra*; the *onus* is on the hirer, to show he was not guilty of negligence. *Marquis* v. *Ritchie*, 2 S. D. 386; *Pyper* v. *Thomson*, 5 D. B. M. 498.

[4] *Contra*; the agent need not be appointed by writing for this purpose.

[5] *Contra*; all corporations can appoint their agent in writing.

minor contracts where it is a trading corporation, and in all contracts, where the corporation is a limited joint stock company.

612. *Agent to sign a deed.*—An agent can only be appointed by writing under seal to sign a deed on behalf of his principal.[a] [1]

614. *Factor's right to pledge.*—A factor had no right at common law to pledge his principal's goods; [2] but now by statute he is in certain circumstances impliedly authorised to do so.[b]

615. *Brokers in London licensed.*—Brokers acting as such within the city of London and liberties, must be admitted and licensed by the court of Mayor and Aldermen, and without such licence, cannot recover their commission and charges.[c] But brokers acting elsewhere are subject to no such restrictions.[3]

CHAPTER VIII.

GUARANTEE.

620. *Contract must be in writing.*—A contract of guarantee or any "special promise to answer for the debt, default, or miscarriage of another," [d] must be in writing,[4] signed by the party guaranteeing, or

[a] Co. Litt. 48*b*; *Harrison* v. *Jackson*, 7 T. R. 209.

[b] 4 Geo. IV. c. 83; 6 Geo. IV. c. 94; 5 & 6 Vic. c. 39.

[c] 6 Anne, c. 16, § 4; *Cope* v. *Rowlands*, 2 M. & W. 159; *Smith* v. *Lindo*, 4 C. B. N. S.

[d] Stat. of Frauds, 29 Ch. II. c. 3, § 4.

IN SCOTLAND.

[1] *Contra;* the mandate need not be by deed.

[2] He had such right at common law. 1 Bell's Ill. 467; *Attwood* v. *Kinnear*, 10 S. D. 817.

[3] *Contra;* there is no restriction in any part of Scotland.

[4] The same since 1856 by 19 & 20 Vic. c. 60, § 6, which enacts that "all guarantees, securities, or cautionary obligations, and all representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person, made for the purpose of enabling such person to obtain credit, money, goods, or postponement of payment of debt, or of any other obligation demandable of him," shall be in writing, subscribed by the guarantor or his agent.

his agent. And so must a representation as to the character, credit, or responsibility of a third person, in order to induce the owner of goods to sell them to the latter on credit.[a] And though no consideration need be stated on the face of the document, yet parol evidence must be given at the trial of any action against the guarantor of some legal consideration.[b] [1]

621. *New surety introduced.*—Where a new surety has been introduced without the knowledge of the former sureties, it seems that in a court of equity it may be proved, by parol evidence, that he was merely a surety for the former sureties.[c] [2]

622. *Discharge of guarantee.*—The discharge of a written guarantee may be proved by oral evidence. [d] [3]

623. *Discharge of one of several sureties.*—Where the creditor discharges A, one of several sureties, whether on paying his share or not, the remaining sureties are thereby discharged entirely [4] from further liability, and not merely to the extent to which A would have been bound to contribute his share.[e]

624. *Limitation of action against surety.*—All actions must be brought on a simple contract of suretyship within six years [5] from

[a] 9 Geo. IV. c. 14, § 6.
[b] 19 & 20 Vic. c. 97, § 3; *French* v. *French*, 3 Scott. N. R. 121; *Morley* v. *Boothly*, 3 Bing. 113.
[c] *Craythorne* v. *Swinburne*, 14 Ves. 160.
[d] 2d Rep. Merc. L. Com. 83.
[e] *Nicholson* v. *Revill*, 4 Ad. & E. 675; 2d Rep. Merc. L. Com. 83.

IN SCOTLAND.

[1] *Contra;* no consideration need be proved. Rep. Merc. L. Com. 80.

[2] *Contra;* it can only be proved by the writ or oath of the creditor. *Lennox* v. *Campbell*, 18th May 1815, F. C.

[3] *Contra;* the discharge can only be proved by the writ or oath of the creditor. But when the implement of the principal obligation admits of being proved by parole, such implement by the cautioner may be so proved. 2d Rep. Merc. L. Com. 83.

[4] The same since 1856, by 19 & 20 Vic. c. 60, § 9, except where the discharge is merely to a co-cautioner who has become bankrupt.

[5] *Contra;* the time of limitation is seven years in both cases, by stat. 1695, c. 5, provided the cautioner have an express clause of relief or a separate bond of relief intimated to the creditor. Bell's Pr. § 601; *Scott* v. *Yuille*, 5 W. S. 436. The time runs from the date of the bond or contract, and does not depend on the cause of action arising; and at the end of seven years the cautioner is *eo ipso* free. But the cautioner may continue bound beyond the seven years, if diligence has been raised against him within the seven years. Bell's Com. by Shaw, 279.

the accrual of the cause of action; but if the contract was by deed or specialty, the action may be brought within twenty years.[1] The cause of action accrues, and the time of limitation runs from the period of the principal making default in payment, or from the time when the debt indemnified against was paid, etc., and not from the time of the giving of the guarantee or indemnity.[a]

625. *Guarantee to or for a firm.*—No guarantee given to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no guarantee for a firm, or individual trading under the name of the firm, shall be binding on the surety after a change in any one or more members of the firm, unless the intention of the parties to the contrary shall appear, either by express stipulation, or by necessary implication from the nature of the firm.[b] [2]

626. *Surety and debtor sued jointly.*—Where an engagement by principal and surety is joint, though the creditor must institute proceedings against both, yet, after judgment is obtained, he is at liberty to enforce payment against the surety, being living, and if there be two or more sureties, against any one of them who is living exclusively, such surety being left to adjust with the principal and with the other sureties, if any, his rights to indemnification and contribution.[c] [3]

Surety, on payment, entitled to assignment of security.—Where a surety pays the debt, he is now entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security held by the creditor, so as to use the name of the creditor in any action or suit against the principal debtor, or any co-surety, for their just proportion of the debt.[d] [4] He was not so entitled previous to 1856.

[a] *Humphreys* v. *Jones*, 14 M. & W. 1.
[b] 19 & 20 Vic. c. 97, § 4.
[c] 2d Rep. Merc. L. Com. 81.
[d] 19 & 20 Vic. c. 97, § 5.

IN SCOTLAND.

[1] *Contra.* See last note.

[2] The same, since 1856, by stat. 19 & 20 Vic. c. 60, § 7.

[3] The same, since 1856, by 19 & 20 Vic. c. 60, § 8. Formerly, if the cautioner had not been bound "jointly and severally," or "as full debtor," he was entitled to the benefit of discussion, *i. e.*, to have the principal compelled by diligence or execution to perform the obligation, so far as the creditor could enforce it. 2d Rep. Merc. L. Com. 81.

[4] This is the same at common law. 2d Rep. Merc. L. Com. 82.

CHAPTER IX.

JOINT INTERESTS—PARTNERSHIP—JOINT-STOCK COMPANIES.

JOINT INTERESTS AND RIGHTS OF ACTION.

627. *Joint contract.*—The general rule at law is, that the contract of several persons is joint and not several; and that there must be express words creating a several liability in order to render them separately responsible. [a] [1]

628. *Joint creditors.*—Where several parties to a deed are entitled to performance of a covenant, or to be paid a sum of money, each cannot sue for his separate share, but all must join in the action and sue for the whole, unless the interests of the covenantees are clearly severed, in which case, each may sue for his portion.[b] [2] If any one refuse to join in the action, his name may be used on tendering him an indemnity for costs.[c]

The rule is, that all must sue, unless there is an express or implied agreement that each may sue.[3]

629. *Simple contracts.*—In the case of simple contracts, the nature

[a] *Byers* v. *Dobey*, 1 H. Bl. 236; Platt on Cov. 117; 1 Chitt, Pl. 9, 41.

[b] *Sorsbie* v. *Park*, 12 M. & W. 146; *Keightley* v. *Watson*, 3 Exch. 717; *Magnay* v. *Edwards*, 13 C. B. 479; *Wakefield* v. *Brown*, 9 Q. B. 209.

[c] *Laws* v. *Bott*, 16 M. & W. 300.

IN SCOTLAND.

[1] *Contra;* it is a contract in which each is concerned to the extent of his own share only. Bell's Pr. § 51; Ersk. 3, 3, 74. But if the contract is expressly stated to be conjunct or joint, each is bound for the whole or *in solidum*. *Com. Bank* v. *Sprott*, 3 D. B. M. 939; 1 Bell's Ill. 72.

[2] *Contra;* the presumption is the reverse, the rule being that though the whole debt can only be sued for by all the parties together, yet each can sue in his own name for his own share separately. It requires express words to enable one to sue in the name of the rest, the obligation in that case being taken to the parties jointly and severally. Bell's Pr. § 52; see *Stewart* v. *Gibson*, 1 Rob. Ap. 260.

[3] *Contra;* the reverse is the rule. See last note.

of the contract, and the situation of the parties from whom the consideration moved, must be looked to in order to see whether all must sue for the whole, or each may sue for his portion.[1]

630. *Survivorship.*—When the creditors are joint, all must join in the action and sue for the whole. If one dies, the survivors alone can sue.[2]

631. *Want of proper parties.*—The want of the proper parties suing as plaintiffs may be objected to by the defendant, by a plea in abatement to the non-joinder, but the chief effect is to cause the plaintiff to add the other parties at his own expense, or, at a later stage, to apply to a judge to amend the record by inserting the names.[a]

632. *Joint debtors.*—Where there are several joint debtors, all must be sued together for the whole debt; for if only one is sued, it can be pleaded in abatement that others are jointly liable with him. If, however, one pay the whole debt, whether before or after judgment, he may sue his co-contractors for contribution of their shares; and he may have an assignment from the creditor of all securities, so as to recover the excess over his just proportion from his co-sureties or co-debtors.[b] If, on the other hand, B, C, D are joint debtors to A, who sues B only, and B does not avail himself of the defence of non-joinder, viz., that C and D are also liable, and judgment goes against B, then A loses all further remedy against C and D.[3] The reason is, that there is only one cause of action for a joint debt, and such cause of action is merged in and extinguished by the judgment; the judgment of a Court of record changes the nature of that cause of action, and prevents it being the subject of another.[c]

633. *Joint and several debtors.*—Where B, C, and D are joint

[a] C. L. P. Act, 1852, § 34, 36; Rule Pr. 6, 1853; Pat. M. & M.'s C. L. Pract. 1083.

[b] 19 & 20 Vic. c. 97, § 4.

[c] *Per* Parke B. in *King* v. *Hoare*, 13 M. & W. 504, and see *post*, § 636.

IN SCOTLAND.

[1] The form of the security makes no difference, nor does the consideration as such.

[2] This is only so where there are express words of survivorship. Where there are no such words, the interest of the party dying is transmitted to his representatives.

[3] *Contra;* this is no defence, and the want of it has no such effect.

and several debtors of A, either all may be sued for the whole debt, or any one may be sued for the whole debt.[1]

634. *Discharge of one of several debtors.*—If A, the creditor, without, in terms, reserving his remedy against the other debtors, discharge any one of B, C, and D, who are joint, or joint and several debtors, and whether on payment or not by B of his share, or any portion thereof, this operates as a discharge not only of B, but of C and D his co-contractors.[a 2]

635. *Reserving remedy against one of several debtors.*—It seems doubtful whether A, on releasing B, can expressly reserve his remedies against C and D, the co-debtors, without their consent; at least what purports to be such a release will, if possible, be construed not as a release of B, but merely a covenant not to sue B.[b]

636. *Limitation of actions where one of several debtors abroad, etc.*—Where one or more of several debtors are abroad when the cause of action accrues, the Statute of Limitations runs not against them, but against those who are within the jurisdiction. And the creditor will not be barred from suing those joint-debtors who were beyond seas, after their return, by reason only that judgment has been already recovered against those who were not beyond seas.[c 3] So where one of several debtors, by part payment, keeps himself out of the statute, the statute nevertheless runs against the others.[d]

PARTNERSHIP.

639. *Partnership not a distinct person in law.*—A private

[a] Co. Litt. 232 *a*; *R.* v. *Bayley*, 1 C. & P. 435; *Oakeley* v. *Pasheller*, 4 Cl. & F. 207.

[b] *Price* v. *Barker*, 24 L. J. 130, Q. B.; *Owen* v. *Homan*, 4 H. L. Cas. 1037.

[c] 19 & 20 Vic. c. 97, § 11.

[d] *Ibid*, § 14.

IN SCOTLAND.

[1] The same. Ersk. 3, 3, 74.

[2] *Contra*; it is merely a discharge of B's share. A discharge of one of several joint-debtors does not release the others further than their right of relief against the party so discharged may be affected. 2d Rep. Merc. L. Com. 91.

[3] Prescription runs against joint-debtors who are absent from Scotland, provided their absence is voluntary, and they remain subject to the jurisdiction of the Scotch Courts. 2d Rep. Merc. L. Com. 71.

partnership of two or more persons is not a distinct person in law, and cannot sue and be sued in the partnership name.[1]

640. *Remedy of partners against each other, etc.*—One of the private partners cannot in general sue or be sued by the others, or by the private partnership, except in a court of equity. Hence also private partnerships, having one or more members in common, can sue each other only in a court of equity. When a partnership sues or is sued at common law, all the partners must be individually named and served with process if the opposite party insist, and it be possible to serve them.[a 2] But in courts of equity a few of the partners, if these are numerous, and it is impracticable to serve the whole with process, may sue or be sued as representing the whole.[b 3]

641. *Actions at law.* — A defence, which is competent to the defendant against any one of the partners suing as co-plaintiffs, is good against all.[4] Pending an action or suit by copartners, one or more of them may gratuitously release the defendant from the whole cause of action.[c 5]

642. *Set-off of partnership debt.*—In a proceeding against co-partners as such, or against one or more of the copartners individu-

[a] C. L. P. Act, 1852, § 34, *et seq.*; Lush's Pract. by Steph. 24, 65.

[b] 2d Rep. Merc. L. Com. 93, 94.

[c] 2d Rep. Merc. L. Com. 96.

IN SCOTLAND.

[1] *Contra;* the partnership is a separate and distinct person in law, the partners being, as it were, only its cautioners (sureties E.) Bell's Com. by Shaw, 213.

[2] *Contra;* the individual partners need not be named or served where the firm contains names of persons. See next note.

[3] *Contra;* the courts are courts of both law and equity. The firm can sue and be sued in its own name, without naming or serving any of the partners, though it is considered safer to use the names of the individual partners. *Wallace* v. *Plock*, 3 D. B. M. 1047. Bell's Com. by Shaw, 214. A private partnership can sue and be sued by any of its members. And if the company be anonymous, *i. e.*, have no denomination but what is descriptive of its object, the names of three at least of its members must be used along with the descriptive name of the company. 2d Rep. Merc. L. Com. 96.

[4] *Contra;* a defence, though it would be valid against one of the partners, would not be available against the company and the other partners. 2d Rep. Merc. L. Com. 96.

[5] *Contra;* one of the partners cannot, during a suit by the company, release the defender. 2d Rep. Merc. L. Com. 96.

ally, a debt due from the plaintiff to one or more of the copartners in the former case, or to all the copartners as such in the latter case, cannot be set off against the plaintiff's claim.[a] [1]

643. *Partner binding copartners by deed.*—In general a partner cannot bind his copartners by a deed or instrument under seal, though otherwise within the scope of the business; he must be authorised by deed or writing under seal to do so.[b] [2]

644. *Bankruptcy of partnership.* — When an adjudication of bankruptcy is made against all the partners, the joint property of the partners as well as the separate property of each partner vests in the assignees[3] in bankruptcy; but the separate creditors of each partner must be first paid in full, before his property can be applied to the debts of the partnership.[4]

645. *Notice of retirement of partner.*—Where a dormant partner retires from the partnership, his liability will continue, unless he give special notice of his retirement to those persons then having dealings with the partnership, and who knew of his connection with the firm. But no notice need[5] be given to those customers who were not

[a] 2d Rep. Merc. L. Com. 98; *France* v. *White*, 8 Scott, 257; *Gordon* v. *Ellis*. 2 C. B. 829; *Stacy* v. *Dicey*, 2 Esp. 469 *n*.

[b] *Harrison* v. *Jackson*, 7 T. R. 207.

IN SCOTLAND.

[1] *Contra*; in a proceeding against a company, or against one or more of the copartners, a debt due from the pursuer to one or more of the copartners in the former case, or to the company in the latter case, may be set off against the claim of the pursuer. 2d Rep. Merc. L. Com. 98.

[2] *Contra*; a deed is not necessary. A partner may bind his copartners in any form in which he can bind himself. 2d Rep. Merc. L. Com. 97.

[3] *Contra*; the partnership may be sequestrated without the individual partners being sequestrated. 2d Rep. Merc. L. Com. 95.

[4] *Contra*; the debts are ranked *pari passu*. Upon the sequestration of copartners, their separate estates are applicable to the payment *pari passu* of their respective separate debts, and of so much of the partnership debts as the partnership estate is insufficient to satisfy. The creditor in a company debt in claiming upon the sequestrated estate of a bankrupt partner, must deduct from the amount of his claim the value of his right to draw payment from the company's funds, and he is ranked as a creditor only for the balance. 2d Rep. Merc. L. Com. 99.

[5] *Contra*; a dormant partner, on retiring from the partnership in order to avoid liability for the subsequent engagements of his copartners, must give special notice of his retirement to all persons then having relations with the partnership, whether they were or were not aware of his connection with it, and also public notice by advertisement. *Hay* v. *Mair*, 27th Jan. 1809, F. C. 2d Rep. Merc. L. Com. 100.

aware of his being a partner.[a] A notice by public advertisement, or in the Gazette, is unnecessary, if there has been special notice,[1] and does not amount to a special notice unless proved, directly or by strong implication, to have been seen by the customer.[b]

646. *Insolvency of a partner.*—If a partner is adjudged a bankrupt, this is a ground for dissolving the partnership.[c 2]

CORPORATIONS.

648. *Municipal Corporations.*—Municipal corporations are to a great extent now regulated by a general statute.[d 3] The mayor or head of the corporation is elected for one year ;[4] but may be re-elected as often as the town council please. The town-clerk is appointed during pleasure.[5]

649. *Common seal.*—One of the incidents of a corporation is to have a common seal. By affixing this seal only can it be bound by deed or contract,[e 6] except in minor contracts and cases of necessity. But now joint-stock companies, which are quasi corporations, may be bound by their agents in the ordinary manner.

650. *Suing and being sued.*—A corporation can only sue and be sued in a court of common law by their attorney, appointed under the common seal.[7]

651. *License to hold lands.*—To enable corporations to purchase

[a] *Farrer* v. *Deflinne*, 1 C. & K. 580.
[b] *Graham* v. *Hope*, Peake, 208; *Jenkins* v. *Blizard*, 1 Stark. 420; *Hart* v. *Alexander*, 2 M. & W. 490.
[c] 2d Rep. Merc. L. Com. 100.
[d] 5 & 6 W. IV. c. 76, *et seq.*
[e] 1 Bl. Com. 475.

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[1] *Contra.* See last note.

[2] *Contra ;* notour bankruptcy, without sequestration, is not a ground of dissolution of the partnership. 2d Rep. Merc. L. Com. 100.

[3] The corresponding statutes regulating burghs are 3 & 4 W. IV. c. 76, 77.

[4] The provost is elected for three years.

[5] In royal burghs, the town-clerk is appointed for life ; but in burghs not royal, for a period of one year.

[6] *Contra ;* the corresponding incident is to elect some officer to represent the corporation, the seal not being used to execute deeds.

[7] *Contra ;* the law agent does not require to be appointed under the common seal.

and hold lands in mortmain, a licence from the crown was necessary,[a][1] by ancient statutes; but now statutory corporations or joint-stock companies may hold land with few restrictions.

652. *Visitor of Ecclesiastical Corporation.*—All corporations ecclesiastical are liable to be visited by a visitor, who is the ordinary, but the Crown is the visitor of the archbishops.[2] Eleemosynary corporations have the founder or his nominee, failing whom the Crown, for visitor. And civil lay incorporations have no visitor, but are controlled summarily by the Court of Queen's Bench.

COMPANIES.

656. *Joint-stock companies.*—A joint-stock company having transferable shares could not exist by common law.[3] Now joint-stock companies are chiefly regulated by statute.[b][4] There are various Consolidation Acts which now regulate to a great extent public companies:—the Lands Clauses Act,[5] 8 Vic. c. 18, 23 and 24 Vic. c. 106; the Railways Clauses Act,[6] 8 Vic. c. 20, 26 and 27 Vic. c. 92, 27 and 28 Vic. cc. 120, 121; the Companies Clauses Act,[7] 8 Vic. c. 16, 26 and 27 Vic. c. 118; Gas-Works Clauses Act,[8] 10 Vic. c. 15; Markets and Fairs Clauses Act,[9] 10 Vic. c. 14; Harbours, Docks, and Piers Clauses Act,[10] 10 Vic. c. 27; Cemeteries Clauses Act,[11] 10 and 11 Vic. c. 65; Water-Works Clauses Act,[12] 10 Vic. c. 17; Commissioners Clauses Act,[13] 10 Vic. c. 16.

[a] Co. Lit. 2, 7 & 8 W. III. c. 37. [b] 25 & 26 Vic. c. 89; 27 & 28 Vic. c. 19.

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[1] *Contra;* no license was necessary.

[2] There is no such functionary as a visitor, and an action of declarator is the only remedy, the Court of Session having no summary jurisdiction.

[3] *Contra;* a company with transferable shares could exist at common law without the authority of the Legislature, the Crown, or the Board of Trade. 2d Rep. Merc. L. Com. 102; *Stevenson* v. *M'Nair*, 3 Ross, L. C. 580.

[4] The Joint Stock Companies Acts apply to Scotland.

[5] The corresponding Act is 8 & 9 Vic. c. 19.

[6] 8 & 9 Vic. c. 33.

[7] 8 & 9 Vic. c. 17; 26 & 27 Vic. c. 92; 27 & 28 Vic. c. 120, 121.

[8] The same Act applies.

[9] The same Act applies.

[10] The same Act applies.

[11] No similar Act exists.

[12] The same Act applies.

[13] The same Act applies.

PART III.

SUCCESSION TO A DECEASED PERSON'S ESTATE.

WILL OF REAL AND PERSONAL ESTATE.

EXECUTORS AND ADMINISTRATORS.

DEVISE OF LAND.

STATUTE OF DISTRIBUTIONS.

DESCENT.

CHAPTER I.

WILLS.

WILL OF REAL AND PERSONAL ESTATE.

660. *Meaning of terms.*—A will originally denoted the instrument by which a person devised real estate, while a testament [1] denoted that by which personal estate was bequeathed. But now the term "Will" is generally used to denote either or both indifferently, as the same statutory solemnities attach to both instruments.

661. *Will not classed with deeds.*—Wills are not classed with deeds,[2] though a deed may be so contrived as to operate in many respects like a will.

662. *Will passes real estate.*—A will passes real [3] as well as personal estate. The power of devising real estate by will was conferred on all subjects of the realm by the Statute of Wills, 32 and 34 Hen. VIII.

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[1] The word testament or will is used to denote a testament of moveable or personal property only.

[2] *Contra;* as heritable property can only pass by a *de presenti* deed, a disposition and settlement (equivalent to a will), including both heritable and moveable property, is generally executed, and must therefore be a deed. Moreover, a testament or will of moveable property is executed like a deed. The term "deed" is frequently used to denote any written instrument, whether in the nature of a will or of a deed in the technical and more restricted sense.

[3] *Contra;* heritable estate can only pass by dispositive words of conveyance *de presenti;* in other words, by a deed. Stair, 3, 4, 26; Ersk. 3, 8, 20. However clear may be the intention of the testator, his testament has no effect on heritable property, nor will the Court, as a court of equity, compel the heir to execute a conveyance in implement of such intention (*Montgomery* v. *Fowles*, Bell's Cas. 203), and though the will or testament was made in England or other country where real estate can pass by will. M. 4481, 4483. Hence it is a common practice for persons possessed of herit-

663. *Formalities of will.*—Before 1838 a will of personal estate required no solemnities of any kind. The signature or seal of the testator was not necessary, and though written by another, and not signed, it might in many cases be a good will. Even instructions for a will, though not reduced into a will in testator's life, might operate as a will. And such informal wills, if executed before 1838, may still be good, for they are expressly excepted from the operation of the stat. 1 Vic. c. 26.

Before 1838 a will of lands required to be in writing, signed by the testator, and attested by three or more credible witnesses.

A will since 1838, and also all codicils to the will, must be in writing, and must be signed and attested.

664. *Signature of will.*—A will must be signed by the testator; but the signature may be supplied if it occur in the testimonium clause, written by his own hand.[a] [1] If he cannot write, the testator may make his mark X; or a third person, or even one of the witnesses, may sign for him at his request and in his presence.[b] [2] If the

[a] *Re Mann*, 28 L. J. Prob. 19.
[b] 1 Vic. c. 26, § 9; *Smith* v. *Harris*, 1 Robert. 262.

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able property to execute a deed or disposition, reserving his own liferent, and power to alter the same, and keeping the deed in his own possession till death; the same effect being circuitously produced as if he had been able to devise real estate by will. In such a case the disposition generally contains a clause declaring it effectual, though not delivered at his death. Ersk. 3, 2, 13. And it must in general be executed more than sixty days before the death. See *post*, § 675 *n*.

There is, however, one case in which a will, purporting to affect heritage, but inoperative for that purpose, may become operative to some extent, viz., where the will gives a legacy to the heir-at-law, and heritage to a third party. In such a case the heir cannot both approbate and reprobate the same instrument, and he cannot have the legacy without giving effect to the gift of the heritage. See *Dundas* v. *Dundas*, 4 W. S. 460; *Trotter* v. *Trotter*, 3 W. S. 407; see *post*, § 710.

[1] *Contra;* this would not be sufficient. *Dunlop* v. *Dunlop*, 1 D. B. M. 912.

[2] *Contra;* a notary, or the parish minister, or clergyman, with two witnesses, only can attest the will of a person who cannot write. Stat. 1584, c. 133; Stair, 3, 8, 34; Ersk. 3, 2, 23; Bell's Pr. § 1867; see *Galletly* v. *M'Farlane*, 6 D. B. M. 1. It seems a clergyman other than the parish minister would not suffice. M. 16,827. The witnesses must see and hear the testator give authority to the notary. M. 12,668; 4 Br. Sup. 418. As to dispositions of heritable estate, see *ante*, § 331 *n*, *et seq.*, and *ante*, § 662 *n*.

person, who so signs for the testator, signs his own instead of the testator's name, the will is good; and a mere mistake of the testator's name by the person who writes the name, will not vitiate the instrument.[a] The signature may be either at the foot or end, or beside or opposite it, and the will will not be vitiated by a blank space intervening, unless very large.[b]

665. Where the will is written on several sheets of paper, only the last[1] requires to be signed, though it is usual for the testator to sign each sheet.[c] It is not necessary that the sheets should be all connected together; it is enough if they were in the same room where the execution took place, and it will be presumed *prima facie* that they were there.[d]

666. *Witnesses to a will.*—There must be at least two witnesses. The will must either be made or acknowledged in their presence. The acknowledgment may consist in the testator producing the will with his signature attached to it, without expressly stating it to be his signature, and requesting the witnesses to subscribe[e] it. These witnesses must be both present at the same time, or at least they must[2] attest the will in presence of the testator.[f] "In presence of the testator" means in such a situation that he could see them if he chose to look.[g] The witnesses may sign by their mark, or their hands may be guided in signing.[3] And their names, residences, and additions, need not be mentioned in the attestation clause.[4] The at-

[a] Re Clarke, 1 Sw. & T. 22.
[b] 15 Vic. c. 24; Wms. Exec. 70; Re Hammond, 9 Jur. N. S. 581.
[c] *Gregory* v. *the Queen*, 4 Not. Cas. 620.
[d] Wms. Exec. 73; *Cook* v. *Lambert*, 32 L. J. 93 Prob.
[e] *Gaze* v. *Gaze*, 3 Curt. 451; Wms. Exec. 77.
[f] *Casement* v. *Fulton*, 5 Moore, P. C. 130; *Hindmarch* v. *Charlton*, 8 H. L. C. 160.
[g] Wms. Exec. 81; *Tribe* v. *Tribe*, 7 Not. Cas. 132.

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[1] *Contra;* unless the will is holograph, or is contained on one sheet of paper, each page must be signed by the testator. Ersk. 3, 2, 14. See *ante*, § 350 *n.*

[2] *Contra;* the witnesses need not sign their names in presence of the testator, but he must either sign in their presence or acknowledge his signature. See *ante*, § 343 *n.*

[3] *Contra;* as the witnesses must subscribe, those who cannot write are incompetent. M. 16,806; 16,906; *Setton* v. *Setton*, 1 Murr. 10.

[4] *Contra;* their names and designations must be stated in the testing-clause. See *ante*, § 342 *n*; 345 *n.*

testation clause merely states that the testator signed in presence of the witnesses present at the same time. But no particular form of attestation clause is necessary, and the want of it merely leads to the Court requiring an affidavit from one of the witnesses that the solemnities of the statute were complied with.[a1]

667. *Handwriting of will.*—It need not be stated in whose handwriting the will is written or engrossed.[2]

668. *Testator's own handwriting.*—And though the will is written by the testator's own hand, witnesses are not the less necessary.[3]

669. *Legatee a witness.*—Where a person, to whom or to whose wife or husband a legacy or any beneficial interest is left by a will made since 1837, is one of the witnesses, such legacy is void, but he or she is a good witness.[b4]

670. *Creditor a witness.*—A creditor whose debt is thereby charged on the real or personal estate of the testator, is[5] nevertheless a good witness to the will.[c]

671. *Wills of infants and feme coverts.*—Infants, *i.e.* persons under the age of 21, cannot, since 1838, make a will.[d6] It was otherwise before 1838 as regards personal estate.[e]

672. A feme covert can make a will, as regards her separate personal estate;[7] and even without separate estate, if her husband

[a] Wms. Exec. 82.
[b] 1 Vic. c. 26, § 15.
[c] 1 Vic. c. 26, § 16.
[d] 1 Vic. c. 26, § 7.
[e] Wms. Exec. 14.

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[1] *Contra;* a testing-clause is an essential part of the deed, or will, unless it be holograph, and an affidavit of the witnesses will not be allowed to supply its place. See *ante*, § 344 *n.*

[2] *Contra;* the testing-clause must show this. See *ante*, 344 *n.*

[3] *Contra;* if the will is holograph, no witnesses are necessary. See *ante*, § 351 *n.*

[4] *Contra;* if the legacy is small, but not otherwise, the legatee is a good witness. M. 16,887; M. Apx. Writ. No. 2; Ersk. 4, 2, 27. A deed or will has been held void, where the witness was one of the trustees; *Ferrie* v. *Buchanan*, 35 Sc. Jur. 196; *Kirke* v. *Russell*, 27 Nov. 1827.

[5] *Contra;* it seems the will would be void. Ersk. 4, 2, 27; *National Bank* v. *Forbes*, 12 D. B. M. 437.

[6] *Contra;* all persons under 21, except pupils, *i.e.* females under 12, and males under 14, may make a will of moveable property. Ersk. 1, 7, 33.

[7] *Contra;* see *post*, § 894, "Marriage."

consent, her will is good. But she cannot dispose of her real estate by will. See *post*, "Marriage."

673. *Limits of testamentary power.*—A man's wife and children have no inchoate interest in his personal estate during life, and consummate at his death, amounting to an absolute right to certain proportionate shares thereof. Hence, though leaving a wife and children, he can by will freely bequeath his whole personal [1] and real estate, which he is entitled to at law or in equity, to strangers, without any regard to such wife and children.[a]

674. *Deadman's part.*—But previous to 1857 in some parts of England, viz., the city of London, province of York, etc., a father could only bequeath what was called the dead-man's part of his personal estate, being one-third, after making certain deductions, his widow being entitled absolutely to a customary share, or *rationabilis portio*, generally another third, and the children to an orphanage share, also a third. It has been matter of controversy whether this custom was not originally the general law of the land; but if it was general, and not local law originally, it has, by imperceptible degrees, been altered.[b] These customs are now entirely abolished.[c] [2]

675. *Will may be made on deathbed.*—A will of lands, made by a testator, while ill of the disease of which he died, cannot be set

[a] 2 Bl. Com. 503.; 1 Vic. c. 26, § 5. [b] Wms. Exec. 3.
[c] 19 & 20 Vic. c. 94.

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[1] *Contra;* the widow has her *jus relictæ*, being one-third or a half of the moveable estate, according as there are children or not, and the children their *legitim*, being another third or a half, according as there is a widow or not, with which the testator cannot interfere by will, unless by antenuptial contract power is given to him to do so. Bell's Pr. § 1579. See as to the *jus relictæ*, *post*, § 738 *n*, and as to the legitim, *post*, § 848 *n*. The husband and father is entire master of his whole moveable property during his life; and it is subject to his contracts made during his life. See *post*, "Marriage." He cannot, however, execute on deathbed, *i. e.*, while ill of the disease of which he afterwards dies, any gratuitous deeds tending to diminish the right of the widow and children. Yet if the deed is rational, and is executed in the form of a disposition *inter vivos*, it may be sustained though the effect is suspended till his death. Ersk. 3, 9, 16.

[2] *Contra;* these local customs of London nearly resembled what is still the common law of Scotland.

aside[1] merely on the ground that it is injurious to the heir-at-law or any other person. It is enough that the testator had a sound disposing mind at the moment of execution. Yet he cannot devise land or bequeath personal estate to purchase land for a charitable purpose, for

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[1] *Contra;* by the *law of deathbed*, a deed, or disposition *mortis causa*, alienating or affecting heritage, may be reduced (*i.e.* set aside) by the heir-at-law, if made while the granter was ill of the disease of which he died, and if he died within sixty days thereafter, however sane he might be. Bell's Pr. § 1786, *et seq.* The state of a man in his ordinary health, and *sui juris*, and not cognosced as an idiot or interdicted, is called *liege poustie*, in contradistinction to the above critical state, known as deathbed or *in lecto*. The heir-at-law, in reducing the deed, must show that his ancestor was sick of his last illness at the date of the deed (*Cogan* v. *Lyon*, 12 S. D. 569; Ersk. 3, 8, 96); that he did not die by accident, or by another disease. *Mackay* v. *Davidson*, 5 W. S. 210; Stair, 3, 4, 28. Assuming the disease to exist at the date of the deed, the disponee is by statute entitled to rebut the presumption of deathbed by proving that the granter survived sixty days after the execution of the deed, or afterwards went to kirk or market unsupported. 1696, c. 4. Many nice questions have arisen as to what is "kirk," what is "market," and what is "unsupported;" but the Court in general has refused to accept any equivalents for these statutory requisites. Thus where half the sermon only was heard, and the person left before the end of it, this was held to be not "kirk." Faichney, M. 3316, Apx. "Deathbed 1." And where the person attended at a meeting of road trustees, this was held to be not "market." Maitland, 16th May 1815, F.C. An act of sederunt, 29th Feb. 1692, attempted to define "kirk" to be "in the day-time, and when people are gathered together, in the church or churchyard, for any public meeting, civil or ecclesiastical," and "market" to be "in the market-place for public market." The sixty days are computed exclusively of the date of the deed. M. 3336.

The right to challenge deeds *ex capite lecti*, *i.e.* on the ground of deathbed, is competent to the heir-at-law, whether of line or of conquest (Ersk. 3, 8, 99), and also to the heir of provision (remainderman E). The crown, if succeeding as *ultimus hæres*, and the crown's donator has the same privilege. *Brock*, 2d Feb. 1809, F.C. It is a privilege personal to the heir, *i. e.* if he approve of the deed, no one claiming under him has a right to insist in the objection. The heir may homologate or ratify (confirm) the deed, and thus waive his privilege; *Ibid*, see *Leith* v. *Leith*, 10 D. B. M. 1137; but he cannot do so to defeat his own creditors. Stat. 1621, c. 18; *Richardson* v. *Richardson*, 10 D. B. M. 872; Bell's Com. by Shaw, 1058. Many questions also arise as to what deeds of alienation may be challenged; and in general they are only spontaneous and gratuitous deeds (voluntary) which tend directly or indirectly to the prejudice of the heir, *i. e.* to diminish his succession; but even deeds for a price, if inadequate, may also be challenged. Bell's Com. by Shaw, 1058.

the Mortmain Act, subject to some exceptions recently made, requires such alienation to be by deed executed during his life.[a]

676. *Revocation by alteration of circumstances.*—Since 1838 there is no implied condition [1] in a will either of real or personal estate, which is made by a testator, who has at the time no children, that such will shall be valid only if he die without leaving lawful issue; nor will any other alteration of circumstances than marriage operate as an implied revocation.[b]

Previous to 1838 the subsequent marriage of the testator and birth of children were an implied revocation of the will, if the children were wholly unprovided for.[c] But previous to 1838 the subsequent marriage alone of the testator was not an implied revocation, though the marriage of a testatrix was so.[d]

677. *Revocation of will by marriage.*—But since 1838 the

[a] See *ante*, § 26; and Recreation Grounds Act, 22 Vic. c. 27.
[b] 1 Vic. c. 26, § 19.
[c] Wms. Exec. 166, 172.
[d] Wms. Exec. 165.

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A deed executed in *liege poustie* sometimes reserves power to the granter to alter it on deathbed, or *in articulo mortis*, but this power is bad unless the original deed effectually conveyed the heritage away from the heir-at-law (*Clyne's trs.* v. *Clyne*, 1 Rob. Ap. 7; *Miller* v. *Marsh*, 27 Sc. Jur. 378; 2 Macq. Ap. 284); yet a power to declare trusts or uses on deathbed may be effectually reserved. *Ker* v. *Ker*, 5 W. S. 718. Where a *liege poustie* deed excluded the heir but reserved power to alter on deathbed, and such alteration is made and a new settlement thereby results, it seems the heir's right of challenge will revive by the revocation of the first deed (*Coutts* v. *Crauford*, 5 Paton, 73; *Moir* v. *Mudie*, 2 Sh. Ap. 9; *Ker* v. *Erskine*, 13 D. B. M. 492), unless the revocation is expressly made conditional on the latter deed being free from challenge. See also 1 Ross, L. C. 594.

[1] *Contra.* Ersk. 3, 8, 46; *Thomson* v. *Robb*, 13 D. B. M. 1326; Bell's Pr. § 1776, 1780, 1865. There is in such a case an implied condition, called the *conditio si sine liberis decesserit.* The birth of a child is an implied revocation of the deed or will; so is the legitimation of an illegitimate child. The condition, however, is ambulatory until the death of the settler; for if the child do not survive him, the disposition or will remains good. So if the disposition or will does not deal with the whole estate, and the child survive long enough to give the settler an opportunity of altering the deed or will, and he do not alter it, the implied condition will not hold. See also *post*, § 700 *n*, 722 *n*.

marriage of a testator or testatrix operates as a revocation [1] of the will, except the will is made in exercise of a power of appointment, and operates on property which would not, in default of appointment, go to the testator or testatrix's heir or next of kin.[a]

678. *Verbal or nuncupative will.*—A verbal will or legacy is bad,[2] unless the testator be a soldier in actual military service, or a mariner or seaman being at sea.[b] But a soldier must be on an expedition at the time, and not merely living in barracks at home or in the colonies.[c] So the seaman must be, strictly speaking, "at sea." [d] And sailors cannot bequeath their pay or prize money, except in writing, executed in a certain way. [e]

679. *Donation mortis causa.*—But a donation *mortis causa* is valid, though there is no will. Its characteristics are, *first*, that the gift must be with a view to the donor's death, and, *secondly*, it must be conditioned to take effect only [3] on the death of the donor from his existing disorder; *thirdly*, there must be a delivery of the subject of donation.[f] The donation is revocable during life; it is liable to legacy duty, and to the debts of the testator; and it may be made to the donor's wife.[4]

[a] 1 Vic. c. 26, § 18.
[b] 1 Vic. c. 26, § 11.
[c] Wms. Exec. 102.
[d] *Ibid*, 102.
[e] 1 W. IV. c. 20, § 48.
[f] Wms. Exec. 686.

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[1] *Contra;* but it may restrict the effect of the will by preventing it from operating upon more than the dead's part, *i. e.*, what remains after the wife's *jus relictæ* and the children's legitim are deducted.

[2] *Contra;* a nuncupative will of any person, whether a soldier, etc., or not, is good to the extent of £8 : 6 : 8. Stair, 3, 8, 34; Ersk. 3, 9, 7; M. 1350; M. 6847; M. 6594. And if the legacy exceed that sum, it will be held good to the amount of £8 : 6 : 8. And it will be a good legacy, though the testator directed it to be committed to writing; but a mere verbal direction to a person to prepare a will is not equivalent to a nuncupative legacy to the person indicated, as not being a final intention. Elch. Leg. No. 13; *Stainton* v. *Stainton*, 6 S. D. 363.

[3] *Contra;* this condition is not essential. Ersk. 3, 3, 91; Bell's Pr. § 1868, 1870. Though a donation is made in contemplation of death, if the subject is delivered, it is held to be a gift and irrevocable.

[4] A donation *inter virum et uxorem* is good, not merely on deathbed, but any time during the marriage; but it is revocable.

Will of Real and Personal Estate.

Mortgages,[1] bonds, policies of insurance, may be the subject of such a gift, as well as all negotiable instruments.[a]

680. *Nomination of executor.*—A will generally names an executor.[2] If it does not, or if the executor fail from death or other cause, the Court of Probate will appoint an administrator.[3] The executor takes out probate, and the administrator obtains letters of administration from the Probate Court.[b 4]

681. *Vesting of estate.*—The personal estate vests in the executor from the date of the death; but in the administrator from the date only of the letters of administration, his title, however, relating back to the death for many purposes.[c 5]

682. *Executor dying, etc.*—B, the executor of A, may bequeath his interest to his own executor C, who will also be executor of A. But where B dies intestate before obtaining probate, an administrator to A *cum testamento annexo* is appointed; where B dies after probate, but before fully administering the estate, an administrator to A *de bonis non* is appointed. Where an administrator dies before administering the estate, neither his own executor nor administrator is entitled to be administrator[6] of A, but another is appointed to A in the regular order.

683. *Executor's claim to residue.*—If there is no residuary legatee expressly nominated, but a clear residue exists, then it is a question of intention, to be collected from the whole will, whether the executor

[a] Wms. Exec. 692; *Watt* v. *Amiss*, 30 L. J. Q. B. 318.

[b] 20 & 21 Vic. c. 77.

[c] Wms. Exec. 557.

IN SCOTLAND.

[1] *Contra;* a bond and disposition in security does not pass by delivery; but a bequest by letter may do so. *Miller* v. *Milne*, 21 D. B. M. 377. See *Cuthill* v. *Wright*, 24 D. B. M. 849.

[2] Called an executor-nominate.

[3] Called an executor-dative.

[4] An executor, in both cases, obtains confirmation from the commissary, who is generally the sheriff. 21 & 22 Vic. c. 56, § 2. An executor-nominate is said to obtain confirmation of a testament-testamentar; an executor-dative gets confirmation of a testament-dative.

[5] The succession vests at the death, whether there is a will or not, but the executor (*i.e.*, including administrator) cannot in general sue till confirmation. 4 Geo. IV. c. 98; 21 & 22 Vic. c. 56, § 10.

[6] *Contra;* the executor-dative of a deceased executor-dative would be executor-dative of A *quoad non executa*. Confirmation vests all the property which had been confirmed in the first executor.

was meant to be a mere trustee as to this residue, or to exclude the next of kin and take it to himself.[a] But in the absence of a contrary intention, the executor is deemed a trustee for the next of kin.[b][1]

684. *Executor's duty to pay debts of testator.*—The duty of an executor or administrator is to appropriate all the legal assets in hand towards paying the debts of the deceased according to a certain order of priority.

685. *Privileged debts.*—The first debt which the executor is entitled to pay, and which is preferred to all other debts, is for funeral expenses according to the rank of the deceased;[c] but these neither include mourning to the widow and family, nor medical expenses.[2]

686. Servants' wages are not entitled to any priority merely as such;[3] though the ancient law was otherwise.[d]

687. The landlord's claim for current rent has no priority[4] over other debts of the same degree; but he can always distrain for rent that is already due, provided there is furniture or goods to distrain upon, and rent has priority over simple contract debts, as stated *post*, § 688.

688. *Order of priority of debts.*—After funeral expenses and expenses of proving the will, the testator's debts must be paid in a

[a] *Mapp* v. *Elcock*, 3 H. L. Cas. 492. *Edwards* v. *Edwards*, 2 Cr. & M. 612.
[b] 1 Will. IV. c. 40.
[c] *Yardley* v. *Arnold*, 1 Car. & M. 434;
[d] 1 Roll. Abr. 927.

IN SCOTLAND.

[1] The same, since 18 Vic. c. 23, § 8. Previously the executor was entitled to one-third of the residue, unless he was also trustee. *Lowndes* v. *Douglas*, 34 Sc. Jur. 717.

[2] *Contra*; suitable mournings to the widow and to such of the children as are present at the funeral are included in deathbed and funeral expenses (Bell's Pr. § 1403); but the mourning must be moderate if the husband died insolvent. *Glass* v. *Weir*, 1 S. D. 156; *Shedden* v. *Gibson*, M. 11,855. Medical expenses are also privileged, and are presumed to be unpaid from the time the deceased became unable to manage his own affairs. M. 4473; *Saunders* v. *Hewat*, 1 S. D. 310; *Drysdale* v. *Kennedy*, 14 S. D. 159.

[3] *Contra*; Bell's Pr. § 1404. This privilege applies to domestic and farm servants, and gardeners (*M'Lean* v. *Sheriff*, 10 S. D. 217); but not to artisans, overseers, or clerks. *Cowan* v. *MacMicken*, 19 Sc. Jur. 91. The amount claimable is only wages for the current term, *i.e.*, a year's, half-year's, or month's wages, according to the hiring.

[4] *Contra*; Bell's Pr. § 1404; the landlord has a hypothec which attaches on the furniture and goods for the current rent, and he can make it effectual by sequestration. See *ante*, § 408 *n.*

certain order of priority; and if the executor neglects this order, and pays a debt of a lower degree before debts of a higher degree, he will, on a deficiency of assets, make himself personally liable.[1] Debts for this purpose are ranked in certain degrees.

1. Debts due to the crown by record or specialty, but not those due on simple contract.[a]

2. Debts declared preferable by certain statutes, such as those due to the poor from deceased overseers of the poor; those due to friendly societies from their officers, etc.

3. Debts of record, *i. e.*, debts due under a judgment of a court of law, or decree of a court of equity. These debts have no precedence among themselves according to date.

4. Debts due on recognisance.

5. Debts of specialty, *i. e.*, debts on bonds, covenants, and writings under seal; to which head belongs also rent, whether such rent was due on a lease under seal or a verbal lease, provided the lands were in England.[b] It makes no difference that the bond or covenant is for a future debt not yet due.[c] But voluntary bonds and covenants, though preferred to legacies, are postponed to simple contract debts incurred for valuable consideration.[d] So bonds for contingent debts shall not stand in the way of simple contract debts.[e]

6. Debts of simple contract, *i. e.*, constituted by parol or writing not under seal; such are bills of exchange, the price of goods purchased, etc. But it seems simple contract debts due to the crown have precedence.[f]

689. *Time for paying debts.*—There is no fixed time allowed to the executor[2] within which he cannot be compelled to pay any of the debts of the deceased. Any creditor may commence an action at law immediately, and convert his debt into a judgment debt;[2] or he

[a] Wms. Exec. 893.
[b] *Vincent* v. *Godson*, 4 De G. M. & G. 546.
[c] Wms. Exec. 919.
[d] *Ibid*, 914.
[e] *Ibid*, 920; see also 22 & 23 Vic. c. 35, § 27.
[f] Wms. Exec. 922.

IN SCOTLAND.

[1] *Contra;* all debts are paid *pari passu* and are of equal rank, except the privileged debts, which are those due to the crown, those made preferable by statute, and deathbed and funeral expenses, and servants' wages. It is not clear whether crown debts rank before these other privileged debts. Bell's Com. by Shaw, 637.

[2] *Contra;* he cannot be compelled to pay any creditor before six months. Bell's Pr. § 1900; A. S. 28th Feb. 1662. See next note.

may file a bill or take out a summons in the Court of Chancery for the administration of the estate of the deceased.

690. *Preference of debts by executor.*—The executor may, out of several debts of equal degree, prefer any creditor he chooses, or prefer a debt of his own ; [a] [1] and this can be done to some extent even after a creditor has brought an action for his debt, so long as judgment is not obtained.[2] So he may go on preferring such debts up to a decree in a court of equity to account, or up to a final decree. When an action has been brought, of which the executor has notice, he cannot *volunteer* to prefer another, though he may do so after notice of a suit in equity ; [b] but he may pay a debt which is demanded. When one of several creditors of equal degree obtains judgment against the executor, the latter must pay such creditor before the rest.[c] But all the debts of a higher degree must be paid before any of a lower degree can be paid. For this purpose the executor is held to have notice of all debts of record ; but as to debts by specialty, an actual notice is required to make him personally liable for paying debts of inferior degree out of their due order.[d] And he will be protected, if he has given due notice to all creditors to make their claim. [e]

If an executor has any difficulty in ascertaining and dealing with debts, he may devolve the administration on a court of equity, when he will be protected [f] from all risk, as the court undertakes the administration. [g] [3] It will also give him advice.[h]

[a] *Cock* v. *Goodfellow*, 10 Mod. 496 ; *Glaholm* v. *Rowntree*, 6 A. & E. 710.
[b] Wms. Exec. 931.
[c] *Ibid*, 930.
[d] *Smith* v. *Day*, 2 M. & W. 684 ; *Oxenham* v. *Clapp*, 2 B. & Ad. 312.
[e] 22 & 23 Vic. c. 35, § 29.
[f] 13 & 14 Vic. c. 35, § 19-25.
[g] *Knatchbull* v. *Fearnhead*, 3 My. & Cr. 122 ; see also *post*, § 790.
[h] 22 & 23 Vic. c. 35, § 30.

IN SCOTLAND.

[1] *Contra ;* the executor cannot prefer even his own debt, and it is contrary to his duty to pay any creditor, until six months after the death. No creditor can acquire priority by first obtaining decree for his debt. All creditors who commence an action and cite him within six months of the death are entitled to share equally in the assets. Stat. 1654, c. 16 & 18 ; Act of Sed. 28th Feb. 1662. And even after the six months, if the fund is undivided, creditors may apply and be let in to a share of the fund. M. 3140 ; 2 Bell's Ill. 463. Each creditor must raise an action within the six months, or a trustee may sue for a number of them.

[2] *Contra ;* the executor is fixed with notice from the date of citation (*i.e.*, service of the writ of summons). 2 Bell's Ill. 463-4.

[3] *Contra ;* an executor is not entitled directly to devolve the administra-

Will of Real and Personal Estate.

691. *Legal and equitable assets.*—What has been stated as to the rules of priority in paying debts of the deceased, applies only to the legal assets, *i. e.*, such assets as the law vests or would have vested in the executor or administrator, as such, for the payment of debts generally, whether the aid of a court of equity is necessary to reach the property or not. On the other hand, equitable assets are such as vest in the executor or administrator, not by law, but by virtue of an express disposition of the property, which must be carried into effect by a court of equity.[a] It has been said, however, that the true test as to whether the assets are legal or equitable, is not whether the executor, but whether the claimant can reach them without resorting to a court of equity.[b] Equitable assets also include all real property which the deceased by will charged with his debts. Courts of equity follow the same rules in regard to legal assets as courts of law, and give the same priority to different classes of creditors. Equitable assets, on the other hand, must be appropriated in paying all the testator's debts *pari passu*, and without preference of specialty to simple contract debts.[1] Thus, where the testator's land is mortgaged at the time of his death, the equity of redemption is equitable assets. So if the testator devise his land to the executor to be sold for the payment of his debts and legacies, the proceeds of this sale will be equitable assets.

692. There is one exception, however, to the equality of payment of debts by the Court of Chancery out of assets which are equitable. All creditors by specialty contract, in which the heirs are expressly bound, must be paid in full before other creditors by specialty and simple creditors, out of the real assets of the deceased, *i. e.*, the real estate which the deceased died seised of, or entitled to.[c] This exception, as already stated, does not hold, where the testator by will

[a] Smith's Comp. 361. [b] Wms. Exec. 1520.
[c] 3 & 4 W. IV. c. 104.

IN SCOTLAND.

tion of the estate on the Court of Session. But he may raise an action of multiplepoinding and cite the creditors to compete among themselves, he himself passively abiding the orders of the court. The court may appoint a common agent to attend to the interest of the creditors. See *post*, § 790 *n*.

[1] Hence the rule is in general the same as to all assets, as it is in England, when the testator charges his debts on his real estate.

charged his real estate with the payment of his debts, for this makes such real estate equitable assets, and consequently all creditors must be paid *pari passu.*[a]

693. *Marshalling the assets.*—Where the testator has left assets, both legal and equitable, and a creditor has obtained a part payment out of the legal assets in preference to other creditors, the Court of Chancery will postpone further payment to such creditor out of the equitable assets, until the other creditors have obtained therefrom equal proportional payments. This is called a marshalling of the assets.[1]

695. *Executor de son tort.*—Where a person without authority interferes and acts as executor or administrator, he subjects himself to all the liabilities, but has few of the privileges of a regular executor. He is called an executor *de son tort.* He has not the usual privilege of retaining assets to pay his own debt first of those in the same degree. Yet it seems he may prefer one of several creditors of equal degree.[2] And the executor *de son tort* does not make himself liable to creditors beyond the assets come to hand, provided he plead properly;[b] and it is a good defence to an action by a creditor against the executor *de son tort*, that he has exhausted the assets in paying debts of an equal or superior degree.[c]

696. *Executor's personal liability.*—An executor or administrator, though not personally liable by law for the debts of the deceased, except so far as he has assets, may yet make himself personally liable beyond that extent by express promise. Such express promise, however, is not binding upon him, unless there is a sufficient consideration

[a] 11 Jarm. & Byth. by Sweet, 435. [b] Wms. Exec. 234.
[c] 2 Bl. Com. 507; Wms. Exec. 920.

IN SCOTLAND.

[1] This is not necessary, as all debts are paid *pari passu.* But where a catholic creditor and a secondary creditor have similar claims on funds or estates, a capricious use of the higher right is not allowed in prejudice of the other. Bell's Com. by Shaw, 989.

[2] *Contra;* a vitious intromitter is personally liable for all the debts; but if he shows he acted *bona fide* and without fraud, and gives an account, he will be relieved beyond the extent of assets. Bell's Pr. § 1921; Stair, 3, 9, 9; Ersk. 3, 9, 49. As to how far fraud is necessary to render a vitious intromitter universally liable, see *Adam* v. *Campbell*, 26 Sc. Jur. 500.

alleged and proved, and unless the promise is in writing.[a] [1] But a sufficient consideration in such a sense is the forbearance of the creditor to sue the executor, such forbearance being requested by the executor.[b] The writing must be signed by the executor or administrator, and the consideration must also appear on the face of the writing, either expressly or by clear implication.[c] An executor will be liable personally, not only for his own contracts in writing, but also for his own tortious and negligent acts, or for a devastavit, *i. e.*, a misapplication of the funds.[d]

LEGACIES.

699. *General, specific, and demonstrative legacies.*—Legacies are general, or specific, or demonstrative, the last being a mixture of the other two.[2] A general legacy is a legacy of personal estate by a general denomination, so as not to indicate any particular thing, nor to be bequeathed out of any particular fund. A specific legacy is a legacy of a specific chattel, or of a specific part of testator's property. A demonstrative legacy is a bequest of so much money payable out of a particular fund. The distinction is important in the event of a deficiency of assets, for the holder of a general legacy must always abate.

700. *Legacy to testator's children.*—The rule as to lapse of legacies by the death of a legatee, who is a child, before the death of the testator, mentioned *post*, § 722, 725, applies to personal as well as real estate.[3]

[a] 29 Ch. II. c. 3, § 4.
[b] Wms. Exec. 1612.
[c] *Saunders* v. *Wakefield*, 4 B. & Ad. 595.
[d] Wms. Exec. 1630.

IN SCOTLAND.

[1] *Contra;* an executor will be liable for the debts of his testator, if he expressly undertake to be liable, without receiving any consideration, or the consideration appearing *ex facie* of the writing.

[2] The division of legacies is into general and special (the last including specific and demonstrative legacies).

[3] The same rule holds by reason of the *conditio si sine liberis decesserit.* See *post*, § 722. But excluding the case of children, legacies are subdivided into simple legacies and legacies with substitutions. A simple legacy is a legacy to A, either by name or description. A legacy with substitutions is a legacy to A, whom failing to B, whom failing to C, or to A and his heirs, whom failing to B and his heirs, etc.

701. *Lapse of legacy.*—A legacy to "A and his heirs" will, in the absence of a contrary intention, lapse by A's death before the testator, unless A is a child or other issue of testator.[1] But a legacy to "A *or* his heirs" does not so lapse.[a]

So a legacy to A and his assignees lapses in the same circumstances, subject to the above exception.[2]

702. *Legacy to A and his children, etc.*—Where a legacy is given to A and his children, it seems that this is an absolute legacy to A, if he has no children at the date of the will and the death of the testator.[b] If A had children living at the date of the will, then the legacy is to A and such children jointly, unless the context shows that A was to take only for life, with remainder to his children.[c 3] A legacy to "A and the heirs of his body," is a legacy absolutely to A, whether he has children or not.

703. *Substituted legatee.*—If a legacy is given to A, whom failing, to B, whom failing, to C, etc., neither A nor B nor C being children or other issue of the testator, and if A dies before the testator, and B survives, the legacy goes to B in substitution; and if both A and B die before testator, then C takes in substitution, precisely as A would have done on surviving.[4]

[a] Wms. Exec. 1088.

[b] Wms. Exec. 985; but see authorities there cited.

[c] *Ibid.*

IN SCOTLAND.

[1] *Contra;* a legacy to A and his heirs or executors does not lapse by A's predecease (2 Bell's Ill. 446) in the absence of a contrary intention, unless A die without issue, and is a child of testator, and the legacy is a provision. *Ibid;* M. 6372; *Fyfe* v. *Fyfe*, 3 D. B. M. 1205; Menz. Conv. 477.

[2] The same. *Bell* v. *Cheape*, 7 D. B. M. 614.

[3] *Contra;* in the cases stated, the legacy would be to A in fee, or absolutely; but his children would be conditional institutes if he died.

[4] The same; this is called a conditional institution of B and of C respectively, *i. e.*, B would only succeed on the condition that A, who is called the institute, predeceased the testator; hence, if A succeeds, the right of B, or of B and C, the conditional institutes respectively, is gone. Menz. Conv. 443; *Johnson* v. *Greig*, 6 W. S. 406. In general, when substitutes are appointed in moveables, they are presumed to be, not substitutes proper (remaindermen E), but conditional institutes (substituted legatees E); for proper substitutes are those whose right does not fly off upon the succession of the institute, but continues, so that they may take the provision, when the institute, after enjoying the right, shall die. See *Fogo* v. *Fogo*, 2 Bell's Ap. 195; 4 D. B. M. 1063.

Legacies.

The effect would not be different if the legacy was to A and his heirs and executors, whom failing, to B and his heirs and executors; for if A died before the testator, his children would not take in preference to B.[1] But if the legacy was to "A *or* his heirs," to "A *or* his personal representatives," etc.; then upon A's death, his heirs, etc., if any, would take before B.[a]

704. *Words, "dying without issue," etc.*—Where, in a devise or bequest of real or personal estate, the words "die without issue," or, "die without leaving issue," or "have no issue," or like words are used, this, in general, is taken to mean a want or failure of issue in the lifetime, or at the death of the person alluded to, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a previous estate-tail or otherwise.[b]

705. *General terms common in bequests.*—There are many general terms used in bequests, which, though loose, have received specific meanings, such as "goods and chattels, estate, furniture, money, things, plate," etc., but the meaning of these is often materially qualified by the context.[2]

There are also several general terms, such as "issue, children, descendants, heirs of the body,"[3] as to which technical, and somewhat arbitrary meanings have been adopted, especially in devises of real estate.

706. *Payment of legacies.*—All debts must be paid before any legacies, whether general or specific, can be satisfied. And even voluntary debts by bond, etc., must also be paid before legacies.

[a] Wms. Exec. 1088.

[b] 1 Vic. c. 26, § 29.

IN SCOTLAND.

[1] *Contra;* the heirs, etc., of A, in such a case, would be conditional institutes, and would take before B.

[2] The same vagueness attends the use of such terms as goods and gear, moveables, effects, debts, etc. It is to be borne in mind that leases, bonds and dispositions in security, etc., are heritable and not moveable estate. See *post*, § 715 *n.*

[3] There being no disposition of real estate by will, but only by deed, there are fewer disputes as to these loose expressions, as a deed generally requires to be executed with professional assistance, and therefore the language is more technical and precise.

Where no time, or even though an earlier time, of payment of a legacy is appointed by the will, the executor cannot be forced to pay it, until a year [1] after the death of the testator.[a] Yet, if the state of the testator's affairs admit of it, the executor has authority to pay legacies before the end of the year.[b]

Interest is in general payable on legacies, where no time of payment is specified, only from the end of the first year.[2] But where the legacy is specific, interest accrues from the death of the testator.[c] And where even general legacies are given to children of the testator, or to those towards whom he stands *in loco parentis*, interest will be given from the death.[d] Where the testator fixes the time of payment, interest in general is not given until such time arrives, whether the legacy has vested or not,[e] unless in the case of legacies to children who have no other maintenance, or in the case of legacies of which the testator apparently meant the interest to be given for maintenance.[f]

707. *Suit for legacy.*—No action in a court of law can be brought by a legatee against the executor, unless for a specific legacy to which the executor has assented; the only remedy is in a court of equity.[3] There is however an exception in favour of small legacies under £50, which may be recovered in the County Court.

708. *Legacy to feme covert.*—Where a legacy is left to a married woman, the executor may decline to pay the husband if he has made

[a] *Wood* v. *Penoyre*, 13 Ves. 333; *Brooke* v. *Lewis*, 6 Mad. 15.

[b] *Angerstein* v. *Martin*, 1 T. & Russ. 241; *Pearson* v. *Pearson*, 1 Sch. & Lef. 12.

[c] *Sleech* v. *Thorington*, 2 Ves. Sr. 563; Wms. Exec. 1283.

[d] *Beckford* v. *Robin*, 1 Ves. Sr. 310; *Crickett* v. *Dolby*, 3 Ves. 13.

[e] *Heath* v. *Perry*, 3 Atk. 101; *Coventry* v. *Higgins*, 14 Sim. 30.

[f] Wms. Exec. 1288.

IN SCOTLAND.

[1] *Contra*; the general rule is, that payment of a legacy cannot be enforced until after the expiration of six months. Bell's Pr. § 1880; 2 Bell's Ill. 452.

[2] *Contra*; if no term of payment is mentioned, interest seems to be payable from the death. *Ibid.*

[3] There being no division into courts of law and equity, an action lies for a general legacy against the executor, and for a special legacy against the possessor of the subject of such legacy, the executor in the latter case being called as a party. 2 Bell's Ill. 444.

no provision for her,[1] and if the husband sue for it, which he can in general only do in a court of equity, the court will, in such circumstances, order a reasonable settlement out of it to be made on the wife, or the wife herself may take the initiative and file a bill for such settlement.[a] And if the husband dies after the testator, but before payment of the legacy, and his wife survives, then the legacy will go to the widow, and not to his representatives.[b 2]

But if the parties have obtained a judicial separation, the wife is entitled to sue for the legacy as a *feme sole*, and to have it paid to herself for her absolute use.[c 3]

709. *Election.*—Where a testator bequeathes a chattel or other property of S, a stranger, to A, the bequest is entirely void, if S chooses to repudiate it; and whether the testator did or did not know, that the property was not his own, the executor is not bound to purchase the chattel, or make compensation to A for the loss of the legacy.[4] But if S gets anything under the will, he cannot claim the benefit without making good at the same time the attempted legacy; he must elect one or the other.

710. The doctrine of election applies also to real estate.[5] The doctrine is however not applicable to those cases where real property is assumed to be devised by a will made before 1838, but was not in fact devised, owing to defective execution; and if a legacy is given

[a] *Re* Cutler; 14 Beav. 220; *Re* Kincaid, 1 Drewr. 326; *Francis* v. *Brooking*, 19 Beav. 347. See also *post*, "Marriage."

[b] See *Leslie* v. *Bayley*, 2 Y. & C. C. C. 91.

[c] 20 & 21 Vic. c. 85, § 25.

IN SCOTLAND.

The husband was entitled absolutely to payment of the legacy; but since 1861 he is bound to make a reasonable provision for her if she claim it (24 & 25 Vic. c. 86, § 16), before he or his creditors have obtained possession.

[2] This will now be the same since 1861. 24 & 25 Vic. c. 36, § 16.

[3] This will now be the same since 1861. *Ibid.*

[4] *Contra;* if the testator knew it was not his own property, the executor must purchase it, or make compensation to A, the intended legatee. Such a legacy is known as *legatum rei alienæ*. M. 13,301; Bell's Pr. § 1882.

[5] This is called the doctrine of *approbate and reprobate*, which is founded on the same principles. A party cannot both approbate and reprobate the same deed or testament. See 1 Ross L. C. 617; *Dundas* v. *Dundas*, 4 W. S. 460; *Douglas' Trustees* v. *Douglas*, 24 D. B. M. 1191.

by the same will to the heir, he may take the legacy without making good the attempted devise,[1] unless the will contains an express condition to that effect annexed to the legacy.[a]

711. *Satisfaction of legacy by portion.*—Where a testator by will leaves a legacy to a daughter, child, or person, towards whom he stands in *loco parentis*, and afterwards in his lifetime gives the child a like sum of money, or even a less sum as a portion on marriage, such portion is *prima facie* presumed to be in satisfaction, or an ademption of the legacy, unless there is something in the will or settlement to rebut that presumption.[b][2] And it makes no difference though the portion was not paid at the time, but the parent merely covenanted to pay it at a future time.[c]

712. *Heirlooms.*—Certain chattels called heirlooms[3] are said to go to the heir-at-law by special custom, and not to the executor; but it is not clearly settled what things are heirlooms, and things are seldom claimed on this ground.[d] It is said they are the best things of every sort, as of beds, pots, tables, pans.

713. It seems, however, they must have come to the intestate through several descents,[4] and the custom must be strictly proved by the heir who claims them. The ancestor cannot by will devise heirlooms, though he can sell them in his lifetime.[e]

[a] Jarman on Wills, 374; *Boughton* v. *Boughton*, 2 Ves. 12; *Brodie* v. *Barry*, 2 Ves. & B. 127.

[b] *Glengall* v. *Thynne*, 2 H. L. Cas. 131.

[c] *Hopwood* v. *Hopwood*, 34 L. T. 59.

[d] Wms. Exec. 641.

[e] 2 Bl. Com. 429.

IN SCOTLAND.

[1] *Contra;* the heir in such a case would be bound to elect, though no express condition was attached to the legacy.

[2] *Contra;* there is no such presumption, unless the father was liable by contract to give the portion—the maxim *debitor non presumitur donare* not applying, unless the tocher was *in obligatione*. *Kippen* v. *Darley*, 30 Sc. Jur. 563; 3 Macq. Ap. 203.

[3] There are no moveables which go to the heir-at-law by custom; but at common law, the heir of every person who dies seised in land has "heirship moveables," being the best articles of furniture in every house, the best farm stock, etc., of the intestate, in order that he may not enter to his predecessor's dwelling-house, etc., quite dismantled by the executors. Bell's Pr. § 1902, *et seq.*; 2 Bell's Ill. 4; Ersk. 3, 8, 17; Stair 3, 5, 7; 3, 3, 8; *Fisher* v. *Dixon*, 4 Bell's Ap. C. 353. See a list of heirship moveables in *Oliphant* v. *Thomson*, 32 Sc. Jur. 132.

[4] *Contra;* it is enough that the deceased died seised of land.

REAL AND PERSONAL.

715. *Real and personal.*—In questions between the heir and the executor, the following distinctions are to be noticed:—Leases or leasehold estates for a term of years, and whether limited to heirs or not, are personalty, and go to the executor; also a lease *pur autre vie*, but the heir of the lessee may take as special occupant.[a] [1]

716. The following also are personal,—advowsons or rights of presentation;[2] tithes;[3] annuities,[4] unless expressly limited to the heir; copyrights and patent rights;[5] life estates;[6] mortgage[7] debts, *i. e.*, debts due to the mortgagee; estates by elegit;[8] deer in a park, *i. e.*, a park by prescription, conies in a warren, doves in a dove-house, fish in a pond, if the deceased was owner of the freehold;[9] canal shares,[0] etc., are real at common law, but in many instances special statutes have declared them personal.

The right of the heir or executor to fixtures varies according to the nature of the interest which the testator had in the freehold—whether he was tenant in fee, tenant for life, tenant for years, etc.[1]

[a] Wms. Exec. 597, 603; see *ante*, § 56.

IN SCOTLAND.

[1] *Contra;* leases, whether for a fixed term or for the life of another are heritable, unless the destination expressly excludes heirs.

[2] *Contra;* patronage is heritable. Bell's Pr. § 1485.

[3] *Contra;* teinds are heritable.

[4] *Contra;* annuities and liferents of a sum are heritable as being rights, having *tractum futuri temporis*. Ersk. 2, 2, 6.

[5] Not decided. See Bell's Pr. § 1480.

[6] *Contra* as to liferents. See *ante*, § 715 *n.*

[7] *Contra;* money due on heritable bonds and on bonds and dispositions in security, is heritable. See *ante*, § 102 *n.*

[8] *Contra* as to the security of adjudication. See *post*, "Procedure."

[9] *Contra;* these seem to be heritable.

[0] *Contra;* Bell's Pr. § 1474.

[1] As to fixtures the law seems to be the same. *Dixon* v. *Fisher*, 4 Bell's Ap. 286.

DEVISE OF LANDS.

718. *Will of lands.*—As already stated, real estate may pass by will as well as by deed.[1] Such will must be executed by the same formalities as a will of personal estate.[1] It is revoked by a subsequent marriage. And it may be made on deathbed, provided the testator has a sound disposing mind.[2]

There are no technical words necessary or essential to pass real estate by will, and the law dispenses with the want of words in wills which are absolutely required in all other instruments, and frequently gives effect to a mere implication.[a 3]

719. *Testator selling land after will.*—After a will is executed, the testator, being still alive, may dispose of the lands comprised therein;[4] though if he re-acquire them, they will again be subject to the will, and the will speaks from the time of the testator's death, and includes all estates acquired subsequently to the date of the will, unless a contrary intention is shown.[b]

720. *Devise of estate-tail.*—A testator may, by his will, give the fee or an estate-tail or any lesser estate in his lands; and, excepting

[a] 2 Bl. Com. 381. [b] 1 Vic. c. 26, § 23, 24.

IN SCOTLAND.

[1] *Contra;* a will cannot pass lands; they can only pass by deed or disposition. See *ante*, § 662 *n.* Yet the formalities of a testament are the same as those of deeds, as to which, see *ante*, § 331, *et seq. n n.*

[2] *Contra;* by the law of deathbed, the proprietor of heritable estate in general is restrained even from executing a disposition *mortis causa* to a stranger during his life, provided he is then ill of the disease of which he afterwards died within sixty days. See *ante*, § 675 *n*, and 677 *n.*

[3] *Contra;* not only is a deed necessary to convey lands, but that deed must contain the word "dispone" in the dispositive clause, such word being held to be essential to the conveyance, and no other words, however clear, are accepted as an equivalent. 1 Ross L. C. 21. See *ante*, § 361 *n.*

[4] This would depend on whether the disposition and settlement *mortis causa* was delivered, and so irrevocable; if not delivered, then the granter could effectually sell the lands, for he had still the *jus disponendi*. *Chalmers* v. *Chalmers*, 14 D. B. M. 57.

marriage settlements, wills are the instruments, by which estates tail are usually given.[1]

721. *Limitation of the fee by will.*—When real estate is devised to "A," without adding words of limitation, such as "and his heirs," etc., such devise passes the fee-simple, or other the whole estate, which the testator had power to dispose of, to A, unless a contrary intention appears by the will.[a] The rule is different as to a conveyance by deed.[b 2]

722. *Lapse by death of devisee of fee-simple.*—Where D, the devisee of the fee-simple of real estate, dies before the testator, the devise lapses. But if D is a child[3] or other issue of the testator, and leaves issue who survive the testator, such issue will take in lieu of D, if the estate or interest bequeathed was not determinable at or before the death of D, unless a contrary intention appear by the will.[c] In such a case the same effect is produced as if the devisee or legatee D survived the testator, and it is not a mere substitution of the children for the legatee; and accordingly, D may dispose of the devise or legacy by will.[d 4] And where D is a stranger to the testator, and dies before him, it would make no difference, though the testator expressly provided, that the devise should not lapse by death, unless he gave the estate, in the event of D's death, to some one else.

[a] 1 Vic. c. 26, § 28.
[b] See *ante*, § 23.
[c] *Johnson* v. *Hare*, 3 Hare, 157.
[d] 1 Vic. c. 26, § 33.

IN SCOTLAND.

[1] An entail can only be created by a conveyance *de presenti*, or by disposition *mortis causa*. See *ante*, § 53 *n*.

[2] *Contra;* the destination in a deed to A, without further words, gives the fee to A. See *ante*, § 23 *n*.

[3] The same. In legacies and dispositions *mortis causa* to the testator's children and grandchildren, when the heirs of the legatee or disponee are not named, the testator is presumed to have intended that the issue should come in place of their parent; and any substitution of a third party is held to be made on the implied *conditio si sine liberis decesserit*. In such a case the grandchild will take before E, even though the destination is to D, whom failing to E. Ersk. 3, 8, 46; Bell's Pr. § 1776; *Mowbray* v. *Scougall*, 2 Sh. & M'L. 305; *Dixon* v. *Brown*, 2 Rob. Ap. 1. The rule has also been extended to the issue of a predeceasing cousin-german; *Christie* v. *Paterson*, 1 S. D. 543; and to the children of legatees, to whom the testator is an uncle or near collateral relation.

[4] *Contra;* D in this case could not dispose of the legacy by will.

723. But if the testator devised to D, and in case of his death to D's executors or personal representatives, or to E, a stranger, etc., then if D died before the testator, whoever comes within the description of "executors," etc., will take.[a]

724. When a devise lapses by the death of the devisee, or from the devise failing or being otherwise void, the estate or interest comprised therein falls into the residue and passes by the residuary devise,[1] if any, unless the will shows a contrary intention.[b]

725. *Lapse by death of devisee of estate tail.*—An exception to the general rule as to lapse also exists where D, the devisee, takes an estate tail or an estate in *quasi* tail, and dies before the testator, leaving children who survive the testator, and who would be inheritable under such entail; in such a case D's child takes,[2] unless the will shows a contrary intention. The effect is the same as if D had died immediately after the testator.[c]

726. *Devise to heir-at-law.*—Where a testator devises his real estate to H, his own heir-at-law, such heir, since 1833, takes as devisee or purchaser, and not by descent.[3] Hence, upon the death of H intestate, the land will descend to the heir-at-law of H, and not to the next heir of the original testator.[d]

727. *Completion of devisee's title.*—A devisee's title is the will itself, and he requires to do nothing further to complete his title;[4] except that, in copyhold estates, he must present a copy to the lord of the manor, to be entered on the court rolls, whereupon the devisee is

[a] *Hinchcliffe* v. *Westwood*, 2 De G. & S. 216.
[b] 1 Vic. c. 26, § 25.
[c] 1 Vic. c. 26, § 32.
[d] 3 & 4 W. IV. c. 106, § 3; *Strickland* v. *Strickland*, 10 Sim. 374.

IN SCOTLAND.

[1] It seems the same.

[2] The same, if D is a child or grandchild of the granter, but not otherwise. See *ante*, § 722 *n*.

[3] The same; the heir would take as a singular successor, yet the result would be, as regards the succession on his death, that the land would go, not to H's heir of conquest, but to H's heir of line, for it is not conquest in H. Ersk. 3, 8, 15; see *post*, § 758 *n*. The course of disponing to the heir is often taken by testators in order to facilitate the completion of the heir's title, and exempt him from a universal representation. Menzies' Convey. 620.

[4] *Contra;* the disponee completes his title in a manner resembling other disponees and vendees. See *ante*, § 364 *n*, and 21 & 22 Vic. c. 76, § 12.

at once admitted.[a] The devisee does not require in general to obtain probate of the will, but if the will is disputed and requires to be proved in solemn form, then the devisee must be cited, and will be bound by the proceedings and by the decree of the Court of Probate.[b] When the devisee requires to prove his title in a court of law or equity, he must either produce the original will, or, on giving notice to the opposite party, must produce the probate or a stamped copy.[c]

728. *Devise to A, whom failing to B, etc.*—Where a testator devises his estate to A, whom failing to B, whom failing to C, etc., A is the devisee and takes by purchase. And if A, not being issue of the devisor, died before the devisor, and thus B took, B would be equally a devisee and purchaser, and on the death of B intestate, the estate would go to B's heir-at-law.[1]

729. *Executory devises and interests.*—A devise, by which a future interest is limited, contrary to the rules of the common law, is called an executory devise,—that term however being often used in another sense as contradistinguished from immediate devises, bequests, or limitations.[2] Thus if testator devises lands to his son A and his

[a] 4 & 5 Vic. c. 35, § 88. [b] 20 & 21 Vic. c. 77, § 61. [c] *Ibid*, § 64.

IN SCOTLAND.

[1] In such a case, A would be the institute, and B and C are generally called substitutes; A would be a singular successor, but not B and C, who would be heirs of provision to A. The effect is chiefly seen in the manner in which A and B would proceed to make up their titles; and much obscurity exists on this subject. See *Fogo* v. *Fogo*, 4 D. B. M. 1063; 2 Bell's Ap. 195; Ersk. 3, 8, 44; Bell's Pr. § 1745; Sandford on Herit. Succession, 264, 380; Menz. Conv. 443. When A's institution is made conditional or contingent on certain events, he is called a conditional institute. When there are several conditional institutes, and any one, on the succession opening, takes the estate, then the interest of the other conditional institutes vanishes. If none of these conditional institutes survives the opening of the succession, the estate goes to the institute last named, and through him to the substitutes, and if there are no substitutes, then to the last institute's own heirs. Sandford on Herit. Succ. 397. A disposition *mortis causa* made by A himself to A, whom failing to B, gives the estate to B preferably to the heirs of A, unless A has a child or other issue subsequently to the date of the disposition; but a destination to A and his heirs, whom failing to B and his heirs, etc., excludes B until all the heirs of A are exhausted. Menz. Convey. 669; *Grahame* v. *Grahame*, 20th June 1816, F. C.; see *ante*, § 703 *n*, and *Whittet* v. *Johnson*, 6 W. S. 83.

[2] Wills do not pass real estate, but similar results are attained by means of a deed of entail, executed with proper fettering clauses. See *ante*, § 53 *n*.

heirs, but in case A should die under twenty-one, then to B and his heirs, A has an estate in fee-simple in possession, subject to an executory interest in B, and if A die under twenty-one, B acquires the fee-simple. If a similar limitation had been by deed, A would have had the fee-simple, and the limitation to B would be void.[a] [1] Formerly, until B's estate vested, his expectancy could not be alienated; but now it can be alienated.[b] An executory interest is subject to the rule against perpetuities; it must arise within the period of any fixed number of lives existing, and twenty-one years more.[c] The Thelluson Act[d] also strikes at accumulations by means of these limitations.

730. *Doctrine of cyprès.*—Where a testator, under a power to appoint by will to children, appoints to children and their issue, this settlement gives an estate tail to the children; and so, if a strict settlement be made by will on a person unborn before the testator's death, his estate for life will be converted into an estate tail by the doctrine of approximating the intention as nearly as possible, called the doctrine of cyprès.[e] So in a devise to a person, followed by a devise to his issue, an estate tail sometimes arises in such person's favour by the same doctrine of cyprès.[f]

Moreover, by a rule peculiar to gifts for charitable purposes, which are not within the Mortmain Act, if the donor declare his intention in favour of charity indefinitely, without defining the objects, or, if defining them, where those objects fail, though the particular mode of application is uncertain or impracticable, and so the gift would be void for uncertainty, yet the general purpose, being charity, will be carried into effect as nearly as possible by the doctrine of cyprès.[g] [2]

[a] Wms. Real Prop. 270.
[b] 8 & 9 Vic. c. 106, § 6.
[c] Fearne, Cont. Rem. 430.
[d] 39 & 40 Geo. III. c. 98.
[e] Burt. Comp. § 826; 2 Sugd. Pow., 4-10, 56-61.
[f] Smith's Fearne, § 504.
[g] 2 Jarman on Wills, 199.

IN SCOTLAND.

[1] *Contra;* the second destination in a deed of entail, properly framed, would not be void on such ground.

[2] It seems the same. *Mag. Dundee* v. *Morris,* 30 Sc. Jur. 528; see *Bonar* v. *Black,* 6 Bell's Ap. 317.

INTESTACY AS TO PERSONAL ESTATE.

732. *Right to letters of administration.*—The persons entitled to be appointed administrators are entitled in the following order:—

1. The husband is absolutely entitled, as a civil right, and not merely at the discretion of the Court of Probate,[a] to be the administrator of his deceased wife.[b] But this right will be excluded in whole or part, if the wife has made a will of the whole or part of her estate with his consent; and her will, so far as it affects her separate estate, is valid.[c]

2. The widow or the next of kin, or both, at the discretion of the Court of Probate.[d] The widow is generally preferred by the Court of Probate, unless she has been judicially separated, or been guilty of misconduct.[e]

3. The next of kin, the Court selecting one, if several are equal in degree.[f] In the first place, the children and their lineal descendants to the remotest degree; and on failure of children, the parents of the deceased; on failure of parents, then brothers and sisters; then grandfathers and grandmothers; then uncles or nephews, great-grandfathers and great-grandmothers, and lastly cousins. Relatives by the father's side and the mother's side are in equal degrees of kindred; and the half blood are equally entitled with the whole blood, though the latter are generally preferred. The Court prefers a sole to a joint administration.[g]

4. A creditor.

5. Any discreet person, at discretion of the Court.[h] [1]

[a] Wms. Exec. 358.
[b] 29 Ch. II. c. 3; but see *Brenchley* v. *Lynn*, 2 Robb. 441.
[c] *R.* v. *Bettesworth*, 2 Str. 1111.
[d] 21 Hen. VIII. c. 5, § 3.
[e] Wms. Exec. 364.
[f] 21 Hen. VIII. c. 5, § 3.
[g] Wms. Exec. 375.
[h] Wms. Exec. 378.

IN SCOTLAND.

[1] *Contra.* 1. The next of kin, *i. e.*, surviving children, if any, etc. All in the same degree are entitled to be conjoined in the office, if they please. The whole blood excludes the half blood in the same degree. All persons related through the mother, excepting brothers and sisters uterine and their issue, are excluded. See 18 Vic. c. 23, § 1, 5.

2. The widow or relict.

733. *Creditor appointed administrator.*—Where a creditor is appointed administrator, he is in the same position as other administrators, and his powers are not limited to his merely helping himself to his own debt, though, as a matter of course, he will pay himself first, as he is entitled to do, if the other debts are of equal degree.[1] Yet if other creditors petition the Court of Probate, the Court will compel such creditor administrator to enter into a bond to secure his paying each his debt *pro rata.*

Where an executor or administrator has been appointed, the creditor can at any time bring an administration suit in the Court of Chancery, or commence an action at law to recover his debt. But the creditors of the next of kin cannot in general intervene in such suits, or, by any kind of legal process, attach or intercept the payment of the next of kin's share; such creditors must sue the next of kin in the usual way.[2]

STATUTE OF DISTRIBUTIONS.

734. *Wife dying intestate.*—1. Where a wife dies intestate, the

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IN SCOTLAND.

3. A creditor.
4. The procurator-fiscal or a factor appointed by the Court.

Where the deceased has left a will or general disposition *mortis causa*, but not nominated an executor, or the nomination has failed, the following is the order in which an executor dative *quoad non executa* (*Nicol* v. *Milne*, 28 Sc. Jur. 457), is appointed :—

1. The general disponee or residuary legatee.
2. The next of kin in the enlarged sense given to the phrase by the recent Act 18 Vic. c. 23, § 3, 4, 5.
3. The widow or relict.
4. A creditor.
5. A special legatee.
6. A factor appointed by the Court.

[1] An executor creditor, who holds a liquid ground of debt, may apply for confirmation to the effect of administering to so much of the property as is sufficient to pay his own debt, but not beyond (Bell's Pr. § 1895), all debts being equal in rank. Other creditors may also apply to be confirmed along with him. And all creditors so confirmed within half a year of the deceased's death, are entitled to share *pari passu.* Act of Sed. 28th Feb. 1662; *Globe Ins. Co.* v. *Mackenzie*, 7 Bell's Ap. 296.

[2] *Contra;* creditors of the next of kin can arrest the share of such next of kin. Bell's Pr. § 1895, 1900.

husband is absolutely entitled to be her administrator.[1] He also becomes as such entitled to all her personal estate, which she could have left by will, whether she leave children or not.[a 2] The Statute of Frauds, 29 Ch. II. c. 3, § 35, expressly enacted that the Statute of Distributions should not extend to the estates of *femes coverts*, and that husbands should have administration of their rights, credits, and personal estates as before that Act. So, if the husband die before obtaining administration, his next of kin, and not those of the wife, will be entitled to letters of administration.[b]

735. But if the husband was judicially separated from the wife, her personalty will go to her next of kin as if she had been a *feme sole*.[c 3]

736. *Husband and father dying.*—2. Where a husband dies intestate, leaving no children or descendants of children, one-half of his whole personal estate goes to the widow, and the other half to his next of kin, and if there are no next of kin, such half goes to the crown.

If there is a child or children, but no widow, surviving, the whole goes to such child, or to the children, as next of kin, in equal shares.

737. If both widow and children survive, then one-third goes to the widow, and the remaining two-thirds to the children in equal shares.[d 4]

738. *Widow's share.*—A wife has, at common law, no right to any share of the husband's personal property; and he can by will bequeath the whole to a stranger. It is only where he happens to die intestate, that she becomes entitled to anything. The widow's thirds, or her claim to a share under the Statute of Distributions, may

[a] 22 Ch. II. c. 18. As to wife's power of making a will, see "Marriage."
[b] Wms. Exec. 360.
[c] 20 & 21 Vic. c. 85, § 25.
[d] 22 Ch. II. c. 10.

IN SCOTLAND.

[1] *Contra;* the wife's next of kin are entitled; *Leighton* v. *Russell*, 25 Sc. Jur. 63; but they cannot now claim anything as her *jus relictæ*. 18 Vic. c. 23, § 6.

[2] *Contra;* her next of kin would be entitled.

[3] The same.

[4] The same, on different grounds; one-third being the wife's *jus relictæ*, one-third being the living children's legitim, and the other third going to the children, and dead children's issue, as next of kin. See next note, and *post*, § 848 *n*.

be barred by express words in an antenuptial settlement. Where the husband by will leaves a provision, stating it to be in bar of her thirds or share, and such provision lapses or fails, she can then claim her share.[a] Where the husband has covenanted to pay after his death to the widow a sum or part of his personal estate, and he dies intestate, then her share, under the Statute of Distributions, is counted a performance *pro tanto* of that covenant, and she cannot claim both;[b] unless the covenant is entire, or there was a breach of it during his lifetime resulting in a debt to the wife.[c] [1]

739. *Some of the children dead leaving issue.*—Where some of the children have predeceased their parent leaving issue, such issue represent their own parent, and take his or her share.[2] Thus if the father had three children, A, B, C, of whom C has died before him leaving issue, and the father's widow survives, and the personalty amounts to £900; the widow takes £300, A and B each £200, and C's children £200, equally divided among such children. But if all

[a] *Pickering* v. *Stamford*, 3 Ves. 332; *Garthshore* v. *Chalie*, 10 Ves. 17. [b] *Ibid*, *Blandy* v. *Widmore*, 1 P. Wms. 324. [c] Wms. Exec. 1345.

IN SCOTLAND.

[1] *Contra;* the widow is not entitled to any share of her deceased husband's personal estate, solely on the ground of his dying intestate. But she has a higher right called the *jus relictæ*, which cannot be barred or interfered with by the husband's will, or any revocable deed. It may however be barred by an antenuptial contract of marriage, which either expressly or by strong implication excludes such right. The rule also is, that the *jus relictæ* is still due, though a separate and reasonable provision be granted, unless the contrary is stated. Ersk. 3, 9, 17; *Keith's Trustees* v. *Keith*, 29 Sc. Jur. 497. Where the wife in a postnuptial settlement renounces her *jus relictæ* for provisions greatly inferior, she may, on the death of her husband, revoke it, and resort to her legal provision. *Dickson*, 5 W. S. 455; *Gaywood*, 6 S. D. 909; *Dixon* v. *Fisher*, 2 Rob. Ap. 345. But where there is a plain intention by the marriage-contract to regulate the whole succession, it may be inferred that the *jus relictæ* was intended to be discharged. Bell's Pr. § 1946. Previous to 1855, if the wife predeceased the husband, her next of kin, executors, or other representatives, could demand from the husband her *jus relictæ;* but this right is taken away, and her will cannot now affect such share of the goods in communion. 18 Vic. c. 23, § 6.

[2] The same, since 1855, by 18 Vic. c. 23, § 1, as to the dead's share, but not as to legitim. Hence, if some of the children have died, the division is in the result slightly different, for grandchildren do not take their parent's legitim. Hence, in the case put above, the widow takes £300, A and B each £250, and C's children £100.

the children are dead and only grandchildren exist, then the grandchildren take each equally and not *per stirpes, i.e.*, by families.[1]

740. *Heir-at-law is one of the next of kin.*—The heir-at-law if also one of the next of kin, is entitled to take a share under the Statute of Distributions, along with the other next of kin, if of equal degree, and is not excluded merely because he takes the real estate as such heir.[2]

741. *Hotchpot.*—Moreover, one of the children who is the heir-at-law and thereby succeeds to the real estate, is nevertheless equally entitled with the rest to his share of the personalty, without bringing into hotchpot the value of such real estate.[a 3] And this is also the case where the lands descend to the youngest son by the custom of Borough English.[b]

742. *Advancement to a child.*—If the heir-at-law or any other child shall have received an advancement out of the intestate's personal estate, this will be counted as part of his distributive share.[c 4]

[a] Stat. Distrib. 22 & 23 Ch. II. c. 10, § 5.
[b] Wms. Exec. 1352.
[c] 22 & 23 Ch. II. c. 10, § 5; Wms. Exec. 1349, 1352.

IN SCOTLAND.

[1] The same.

[2] *Contra;* he is also one of the next of kin, but if he has succeeded to the heritage, he must collate. See next note.

[3] *Contra;* the heir-at-law, in claiming his legitim, and also his share of the dead's part, must first *collate* the heritable estate. Bell's Pr. § 1910, 1913. Collation is a privilege which the heir-at-law has. He must collate everything he has got, which he would have succeeded to as heir. Though he got the estate by deed from his ancestor he must collate it. M. 2372. He must also collate his liferent in an entailed estate. *Anstruther* v. *Anstruther*, 2 Sh. & M'L. 369. Every heir-at-law was, however, formerly not entitled to collate; it was only where he was one of the next of kin. Ersk. 3, 8, 77; M. 2383. But now where B, a person predeceasing the ancestor A, would have been heir, B's child, being B's own heir-at-law, is entitled to collate, and if B's child refuse to collate, the brothers and sisters of B's child and their descendants shall take a share of the moveable estate equal to the excess in value which they thereby lose. 18 Vic. c. 23, § 2. An heir of conquest has also the right to collate. Bell's Com. by Shaw, 662. The heir may renounce his right of collation, but not so as to prejudice his creditors, *Ibid.* 663, and subject always to the consequence stated in 18 Vic. c. 23, § 2, *ante.*

[4] *Contra;* an advance is only counted as part payment of the share of legitim, but not of the child's share of the dead's part. *Clark* v. *Burns*, 3 S. D. 326; *Keith's Trustees* v. *Keith*, 29 Sc. Jur. 497.

If the advancement he has got should be less than his share would be, then he must first bring into hotchpot what he has already received.[a] But this rule applies only to the distribution of an intestate father's estate, and not to that of an intestate mother. A loan by the father to the son, though released in the father's lifetime, has been held an advancement [b 1]

743. So if any of the younger children, not being the heir-at-law, has received an advancement out of the intestate's real estate, this is counted as part of such child's share.[2] The advancement must be by virtue of some act in the intestate's lifetime, and not by will.

744. *How degrees of kin counted.*—Where there are no children or descendants, the degrees of next of kin are reckoned according to the civil and not the canon law, *i. e.*, a great-uncle, a cousin, and a nephew's children, are all in the fourth degree. [3]

745. *Half blood.*—A brother or sister of the half blood, whether by the mother or father's side, shares equally with the whole blood, [c 4] for they are both equally near of kin to the intestate.[d]

746. *The mother and her relations.*—The mother is not restricted to a fixed proportion of the estate, but she shares equally with the brothers and sisters, and their issue, if any. The relations on the mother's side share equally with those on the father's side.[5]

[a] *Edwards* v. *Freeman*, 2 P. Wms. 443.
[b] *Gilbert* v. *Wetherell*, 2 Sim. & Stu. 274.
[c] Wms. Exec. 1348, 1362.
[d] Wms. Exec. 1348.

IN SCOTLAND.

[1] *Contra ;* a loan by the father, for which he proved on the son's bankrupt estate, was held no advance. *Webster* v. *Rethie*, 31 Sc. Jur. 504.

[2] *Contra ;* this is not so either as to children's legitim or to their next of kin's share. Bell's Pr. § 1588 ; Ersk. 3, 8, 25.

[3] *Contra ;* the degrees of next of kin are counted neither by the civil nor the canon law.

[4] *Contra ;* the brothers and sisters german and their issue first take exclusively, then brothers and sisters consanguinean and their issue exclusively, and then brothers and sisters uterine and their issue. 18 & 19 Vic. c. 23, § 5.

[5] *Contra ;* neither the mother nor relations on her side formerly succeeded ; but since 1855 the mother gets a fixed proportion of one-third of the dead's part if the intestate leaves no issue and no father. 18 Vic. c. 23, § 4 ; Ersk. 3, 8, 9. Also brothers and sisters uterine succeed after, but not equally with, brothers and sisters consanguinean, since 1855 by 18 Vic. c. 23, § 5, as stated *ante*, § 745 *n*, provided the father and mother are both dead ; but they never take more than one half of the dead's part.

Statute of Distributions.

747. *Where one of kin is dead leaving children.*—There is representation of a parent by children among descendants *ad infinitum*; and among collaterals as far as the class of brother and sister's children, but no farther; for example, if an intestate left a brother alive, and ten children of a deceased sister, such ten children will take one moiety of the personal estate, and the brother the other; but if one of two uncles, who together are the next of kin, is dead leaving children, the surviving uncle takes the whole, and the children of the other uncle nothing.[a] [1]

748. *The father.*—The father succeeds immediately after the issue of the intestate, and takes the whole in preference to all collateral next of kin.[b] [2]

[a] Wms. Exec. 1364. [b] Wms. Exec. 1357.

IN SCOTLAND.

[1] Formerly there was no representation of one of several next of kin who had died; but since 1855, by 18 Vic. c. 23, § 1, there is representation to the extent of brothers' and sisters' children. There is, however, no representation of children as to legitim. Ersk. 3, 9, 15.

[2] *Contra;* it is only since 1855, by 18 Vic. c. 23, § 1, that the father succeeds after the issue, and he takes, not the whole, but only a half; but if the issue are dead, he takes the whole of the dead's part.

The following Tabular View shows how the personal estate of a deceased person intestate is distributed in England and Scotland respectively; but it is to be borne in mind, as already stated, that in Scotland the widow has her *jus relictæ*, and the living children their *legitim*, whether the husband and father dies testate or intestate:—

The following is a TABULAR VIEW of the

IN SCOTLAND.

1. Living Children as legitim - - } 1/3	Living children as next of kin - - - *per cap.* } 1/3 Dead children's issue *per stirp.*	Widow, 1/3 as *jus relictæ.*
2. Grandchildren living - - - - - - - *per cap.* Dead grandchildren's issue - - - - - *per stirp.* } 2/3 And so on downwards.		
3. Living brothers and sisters, full blood *per cap.* Dead ditto's issue - *per stirp.* } 4. Nephews and nieces by full blood - *per cap.* 5. Great-nephews and nieces by full blood, children of No. 4 - - - - - - - - *per cap.* And so on downwards till exhausted.	Father 1/2, failing whom, Mother 1/3, of the dead's part.	Widow, 1/2 as *jus relictæ.*
6. Living brothers and sisters, consang. *per cap.* Dead ditto's issue *per stirp.* } 7. Nephews and nieces (children of No. 6) *per cap.* 8. Great-nephews and nieces (children of No. 7) - - - - - - - - - *per cap.* And so on downwards.		
9. Father.		
10. Uncles and aunts paternal - - - *per cap.* 11. Cousins-german (children of No. 10) *per cap.* 12. (Children of No. 11) - - - - - *per cap.* And so on downwards.	Mother as above, failing whom, Brothers and Sisters uterine, and issue, 1/2 of the dead's part.	
13. Grandfather paternal. 14. Great-uncles and aunts paternal - *per cap.* 15. Children of ditto - - - - - - *per cap.* And so on downwards.		
16. Great-grandfather paternal, etc.		

distribution of an Intestate's personal estate.

IN ENGLAND.

1. Living children - - - - - - - - - *per cap.* Dead children's issue - - - - - - - - *per stirp.* } $\frac{2}{3}$ 2. Living grandchildren - - - - - - - *per cap.* Dead grandchildren's issue - - - - - *per stirp.* } $\frac{2}{3}$ And so on downwards.	Widow, $\frac{1}{3}$
3. Father.	Widow, $\frac{1}{2}$
4. Mother. Living brothers and sisters, full and half blood, *per cap.* Dead brothers and sisters' ditto's children, *per stirp.*	
5. Grandfathers and grandmothers paternal or maternal - - - - - - - - - - - - *per cap.* Nephews and nieces by father or mother's side *per cap.*	
6. Nephews and nieces by father or mother's side *per cap.* Uncles or aunts by father or mother's side - *per cap.* Great-grandfathers and great-grandmothers by father and mother's side - - - - - - *per cap.*	
7. Great-uncles and aunts paternal and maternal *per cap.* Cousins-german by father and mother's side *per cap.* Children of nephews and nieces by father and mother's side - - - - - - - - - - - *per cap.*	
8. Great-uncles' and aunts' children paternal and maternal - - - - - - - - - - - - *per cap.* Children of cousins-german - - - - - - *per cap.* Great-great-uncles and aunts - - - - - *per cap.*	
9. Second cousins, *i. e.*, children of great-uncles' and great-aunts' children - - - - - - - *per cap.*	

Note.—*Per capita* means per head; *per stirpes* means per family, the person being dead through whom the children claim.

The persons mentioned in one number all take equally, and must all be dead before those in the following number can succeed.

Brothers, etc., consanguinean, mean those by the same father; brothers, etc., uterine, mean brothers, etc., by the same mother.

DESCENT.

751. *Heir-at-law legitimate at birth.*—The heir-at-law must have been born in lawful wedlock and so must have been legitimate at his birth; and he cannot succeed to real property in England, where he was born illegitimate in another country, though by the law of such country he was afterwards made legitimate, and would have succeeded if the property had been situated in that country.[a] [1]

752. *Heir presumptive.*—An heir presumptive is a person who, though not certain to be heir, would succeed in the event of the ancestor's immediate death; thus an only daughter is presumptive heir to her father, until a son is born.[2]

753. *Heir apparent.*—An heir apparent is the person, who will certainly be heir if he survive the ancestor; thus the eldest son is the heir apparent of his father.[3]

754. The moment the ancestor dies, the latter is called the heir, and not the heir apparent.[4]

755. *From what stock traced.*—From 1833 to 1859 descent was traced not from the person last seised [5] but from the last purchaser, whether such purchaser was actually seised or not, provided he was entitled to be so.[b] But to avoid going too far back, the person last

[a] *Birtwhistle* v. *Vardell*, 5 B. & C. 438; Re Don's Estate, 4 Drewr.

[b] 3 & 4 W. IV. c. 106, § 1.

IN SCOTLAND.

[1] *Contra;* it is quite enough if the child be legitimate at the time he or his issue succeeds to heritage. Thus a child legitimated *per subsequens matrimonium* is legitimate for all purposes in Scotland. But where the child is born in a country where his parents are domiciled, and where the law of legitimation *per subseq. matr.* is unknown, it is different. See *post*, Part VII.

[2] The heir presumptive means the heir-at-law, *i. e.*, the person who is certain to be heir if he lives and survives the ancestor. See next note.

[3] An apparent heir means the heir-at-law, who, after the date of the ancestor's death, has the right, but has not yet made up his titles. See *post*, § 779 *n.* Thus he, who is called the heir apparent in England, is generally called in Scotland the heir presumptive. Yet these phrases are also sometimes used popularly in the English sense.

[4] *Contra.* See last note.

[5] *Contra;* the root of the title is the person who died last vest and seised, Bell's Pr. § 1658, whether he inherited or not, *i. e.*, whether he took as heir or as singular successor; but in the latter case the succession slightly varies, being what is called, succession to conquest. See below.

entitled to the land was taken to be the purchaser, unless it could be proved that he inherited the estate.[a] And now, where there is a total failure of heirs of the purchaser, or where any land is descendible as if an ancestor had been the purchaser thereof, and there is a total failure of the heirs of such ancestor, the descent is traced from the person last entitled, as if he had been purchaser.[b]

756. *Order of descendants.*—In succession by descent males are preferred to females; the eldest of several males in equal degree of consanguinity is preferred; females inherit together and are called coparceners; all the lineal descendants *in infinitum* of any person deceased represent their ancestor.[1]

757. There are, however, two exceptions to these rules by peculiar local custom, viz., that of gavelkind, prevailing chiefly in Kent, whereby the land goes to all the sons or brothers, etc., in equal shares; and the custom of borough English prevailing in several cities and boroughs, whereby the land goes to the youngest son or brother, etc., to the exclusion of the other sons or brothers.[2]

758. *Where a middle brother purchases land.*—In descent it makes no difference that the intestate himself did not inherit the land but acquired it by purchase, except that in that case he must himself be the stock from which descent is traced. And if he was a middle brother, and had no issue, his father, and next his eldest brother, would be his heir-at-law.[3]

[a] 3 & 4 W. IV. c. 106, § 2. [b] 22 & 23 Vict. c. 35, § 19.

IN SCOTLAND.

[1] The same. Ersk. 3, 8, 5.

[2] These customs are not known, but see next note.

[3] *Contra;* there is a difference as to *conquest* (*i. e.*, land acquired otherwise than by descent). Succession to conquest is seen, where the intestate is a middle brother or sister, who acquired the estate, not by inheritance, but as a singular successor, in which case the succession ascends once before it follows the ordinary rule. Bell's Pr. § 1670; Ersk. 3, 8, 14. That is to say, the next elder brother succeeds instead of the next younger brother. If a sister dies, the succession goes to her next elder brother; where there are sisters only, then there is equal partition among the other sisters. If there are no brothers or sisters of the full blood, the same rule holds as to brothers consanguinean. When the heir of conquest dies after his titles are made up, then the succession goes in the usual way. The rule of succession does not apply to all heritable subjects, but only to those which are vested by sasine, or require sasine to complete the right. Thus it does not apply to leases or personal bonds excluding executors. Bell's Pr. § 1672.

759. *Father succeeds after descendants.*—Since 1833, on failure of lineal descendants, the nearest lineal ancester inherits, *i. e.* a father succeeds before a brother.[a] [1]

760. *Order of succession after father.*—Since 1833 the father and then all the males of his paternal ancestors, and their descendants [2] are next admitted, and then the females of the paternal ancestors or their descendants. Then the males of the maternal ancestors or their descendants; then the females of the maternal ancestors and descendants. Hence the father and all his most distant relatives have a preference over the mother [3] and her relatives.[b] And the mother of a more remote male ancestor is preferred to the mother of the less remote male ancestor.[c]

761. *Brothers and sisters.*—When the succession comes to brothers and sisters, if the intestate had both elder and younger brothers, it goes, after the father, first to the intestate's eldest [4] brother and his issue, and so on according to age down to the youngest of the brothers, and lastly to sisters as coparceners.

762. *Half blood.*—Since 1833 a kinsman of the half blood inherits next after a kinsman of the whole blood in the same degree, and after the issue of such kinsman when the common ancestor is a male, but next after the common ancestor when such ancestor is a

[a] 3 & 4 W. IV. c. 106, § 6. [b] 3 & 4 W. IV. c. 106, § 6, 7.
[c] *Ibid*, § 8.

IN SCOTLAND.

[1] *Contra;* instead of ascending, the succession deviates to the collateral line, that is, to the next younger brother and descendants, and after the younger brothers are exhausted, then the succession returns inversely to the next elder brother and then to the eldest brother, and next to the father. Ersk. 3, 8, 8.

[2] *Contra;* the order of succession to heritage is this. After the father comes the father's next younger brother and descendants, and so on to youngest brother and descendants, then back to the father's next elder brother, etc., as in last note.

[3] *Contra;* the mother and her relatives never succeed in any contingency. Bell's Pr. § 1667, 1668. Even the mother's own estate, after vesting in her son or daughter, never ascends to the maternal line again. Ersk. 3, 8, 9; Stair, 3, 4, 35.

[4] *Contra;* before reaching the father, the succession goes to the next younger brother and so on down to the youngest, then to the next elder and so on to the eldest, and lastly to sisters as heirs-portioners. Ersk. 3, 8, 8; see *ante*, § 759 *n.*

TABLE OF DESCENT OR SUCCESSION

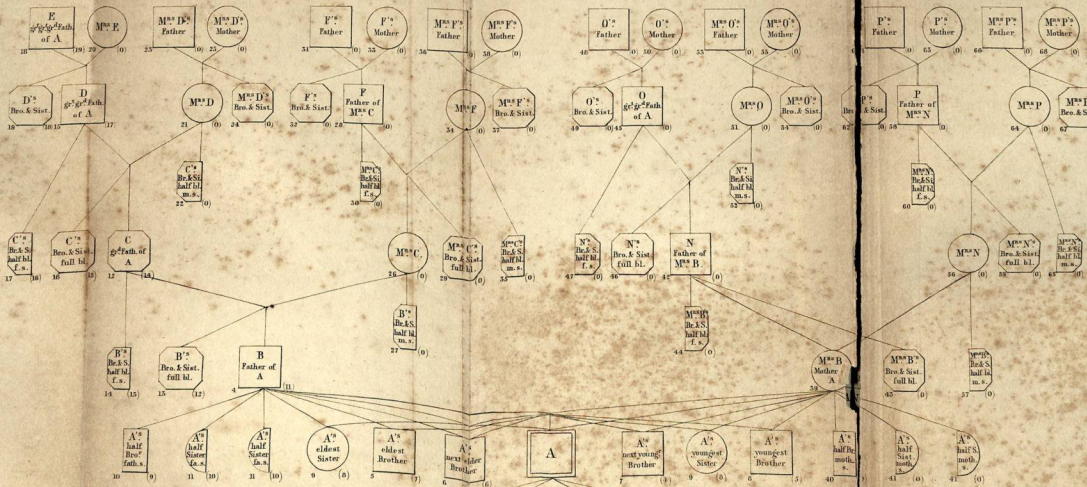
to REAL or HERITABLE ESTATE

in ENGLAND and SCOTLAND respectively.

Peterson's Comp. of E. & S. Law, to face p. 251

PATERNAL LINE.

MATERNAL LINE.


E
gr-gr-gr-Fath. of A
Mrs E
Mrs D's Father
Mrs D's Mother
F's Father
F's Mother
Mrs F's Father
Mrs F's Mother
O's Father
O's Mother
Mrs O's Father
Mrs O's Mother
P's Father
P's Mother
Mrs P's Father
Mrs P's Mother
D's Bro. & Sist.
D
gr-gr-Fath. of A
Mrs D
Mrs D's Bro. & Sist.
F's Bro. & Sist.
F
Father of Mrs C
Mrs F
Mrs F's Bro. & Sist.
O's Bro. & Sist.
O
gr-gr-Fath. of A
Mrs O
Mrs O's Bro. & Sist.
P's Bro. & Sist.
P
Father of Mrs N
Mrs P
Mrs P's Bro. & Sist.
C's Br. & Si. half bl. m. s.
Mrs C's Br. & Si. half bl. f. s.
N's Br. & Si. half bl. m. s.
Mrs N's Br. & Si. half bl. f. s.
C's Br. & Si. half bl. f. s.
C's Bro. & Sist. full bl.
C
gr-Fath. of A
Mrs C
Mrs C's Bro. & Sist. full bl.
Mrs C's Br. & Si. half bl. m. s.
N's Br. & Si. half bl. f. s.
N's Bro. & Sist. full bl.
N
Father of Mrs B
Mrs N
Mrs N's Bro. & Sist. full bl.
Mrs N's Br. & Si. half bl. m. s.
B's Br. & S. half bl. m. s.
Mrs B's Br. & Si. half bl. f. s.
B's Br. & S. half bl. f. s.
B's Bro. & Sist. full bl.
B
Father of A
Mrs B
Mother of A
Mrs B's Bro. & Sist.
Mrs B's Bro. & Sist. full bl.
Mrs B's Br. & Si. half bl. m. s.
A's half Bro. & Sist. fath. s.
A's half Sister fa. s.
A's half Sister fa. s.
A's eldest Sister
A's eldest Brother
A's next older Brother
A
A's next young Brother
A's young'st Sister
A's youngest Brother
A's half Bro. moth. s.
A's half Sist. moth. s.
A's half S. moth. s.
A's eldest Son
A's second Son
A's eldest Dau.
A's youngest Dau.

The Numbers at the Left hand corner shew the order of descent in England.
The Numbers at the Right hand corner shew the order of succession in Scotland.
Where the persons named never succeed in any circumstances they have the No (0) attached.

In this Table the descent is traced from A.
F. s. means on the father's side.
m. s. ..... on the mother's side.

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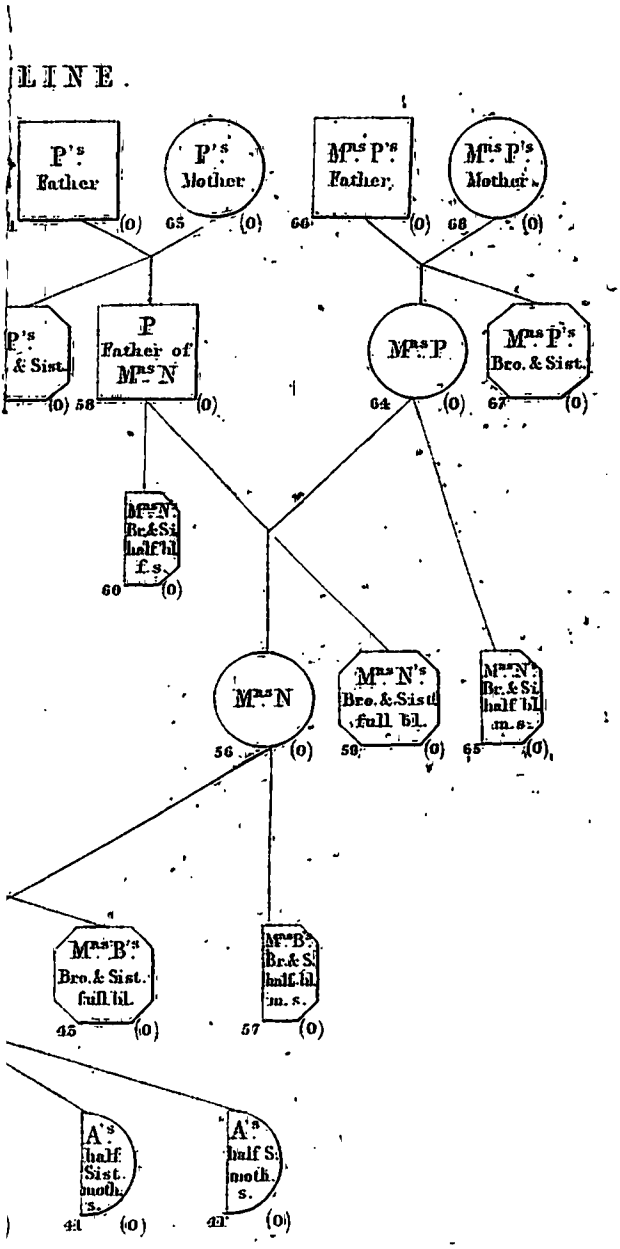
LINE.
P's Father
P's Mother
Mrs P's Father
Mrs P's Mother
1 (0) 65 (0) 66 (0) 68 (0)
P's & Sist.
P Father of Mrs N
Mrs P
Mrs P's Bro. & Sist.
(0) 58 (0) 64 (0) 67 (0)
Mrs N Br. & Si. half bl. f. s.
60 (0)
Mrs N
Mrs N's Bro. & Sist. full bl.
Mrs N Br. & Si. half bl. m. s.
56 (0) 59 (0) 65 (0)
Mrs B's Bro. & Sist. full bl.
Mrs B Br. & S. half bl. m. s.
45 (0) 57 (0)
A's half Sist. moth. s.
A's half S. moth. s.
41 (0) 42 (0)

In this Table the descent is traced from A.

f. s. *means on the father's side*

m. s. *on the mother's side*

female.[a 1] So that the brothers of the half blood on the father's side, *i.e.*, brothers consanguinean inherit next after the sisters of the whole blood and their issue; and the brothers of the half blood on the mother's side, *i.e.*, brothers uterine inherit next after the mother.

763. Hence the half blood uterine is not excluded.[b 2]

The accompanying TABLE of DESCENT shows the Order of Succession to Real or Heritable Estate in England and Scotland respectively.

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764. *One of the line attainted.*—Since 1833, where one of the relations of the ancestor has been attainted before the ancestor's death, the attainder shall not prevent persons from claiming descent through such attainted relation.[c 3]

765. *Devise to heir-at-law.*—Since 1833, where land is devised to the heir-at-law, the latter is held to have acquired the land as a devisee, *i. e.*, by purchase, and not by descent.[d 4]

766. *Descent of estate-tail.*—The descent of an estate-tail, which is not barred, is traced from the donee in tail,[5] he being the last purchaser, and each of the heirs of the body taking *per formam doni.*[e]

777. *Coparceners.*—The females or their heirs, being coparceners, take equal shares in the inheritance. And the eldest daughter or parcener is not exclusively entitled to the whole of the mansion-house

[a] 3 & 4 W. IV. c. 106, § 9.
[b] *Ibid.*
[c] *Ibid*, § 10.
[d] 3 & 4 W. IV. c. 106, § 3.
[e] *Doe d. Gregory* v. *Whichelo*, 8 T. R. 211; see *ante*, § 51.

IN SCOTLAND.

[1] *Contra;* only the half blood consanguinean, *i. e.*, brothers and sisters by the same father, but not the same mother, succeed after the full blood. If they are issue of a former marriage, the youngest brother consanguinean first, and gradually upwards; if of a subsequent marriage, the eldest first, and gradually downwards. Bell's Pr. § 1665.

[2] *Contra;* the half blood uterine, *i. e.*, collateral relations by the same mother, but not the same father, never succeed in any event. Bell's Pr. § 1665; Stair, 3, 4, 8.

[3] *Contra.* Bell's Pr. § 1639; it seems his blood is corrupted for all purposes, and the estate would go to the crown when it reaches that point.

[4] *Contra;* this is not conquest in the heir. Bell's Pr. § 1673; Ersk. 3, 8, 15; see *ante*, § 726 *n.*

[5] *Contra;* each succeeding heir of entail is heir of provision of the immediately preceding heir, who died last vest and seised. See *ante*, § 51.

on the country estate and the land on which it stands,[a 1] nor to the custody of the title-deeds.[2] Nor is the eldest coparcener exclusively entitled to a peerage dignity, or title of honour,[3] but it is in abeyance until the crown prefer one of the sisters.

778. Any coparcener can compel a partition[4] of the property by filing a bill for a partition in the Court of Chancery, when the court will appoint commissioners to make the best division they can; they generally assign the shares by lot.[b]

TITLE AND LIABILITY OF HEIR-AT-LAW.

779. *Vesting of realty.*—When a person seised of real estate dies intestate, the real estate vests *ipso facto et ipso jure* in the heir-at-law, whether the latter will or no, without any process or form of law.[5] The maxim is—*mortuus sasit vivum.*

780. Hence the heir cannot disclaim or renounce,[6] though he may

[a] See *ante*, § 166. [b] *Story* v. *Johnson*, 1 Y. & C. 538.

IN SCOTLAND.

[1] *Contra;* the eldest heir-portioner takes the country mansion-house as her *præcipuum* or exclusive right, without compensation to her sisters. Bell's Pr. § 1654; *Halbert* v. *Dickson*, 29 Sc. Jur. 350; see *ante*, § 164.

[2] *Contra. Ibid;* Denholm, M. 2447.

[3] *Contra;* the eldest heir-portioner is entitled to such peerages, dignities, and titles of honour, as are not limited otherwise, *i. e.*, as do not exclude heirs-portioners. Bell's Pr. § 1659.

[4] The heir-portioner can also obtain a division for a like purpose.

[5] *Contra;* the land lies in abeyance, as it were, and is called *hereditas jacens*, and the heir must make up his title by an active proceeding called a service. He has a year to make up his mind (*annus deliberandi*) whether he will be served heir. Dignities, leases, etc., vest, however, without service. In this transition state he is called the heir-apparent, and is entitled to enter into possession, and draw the rents. He is entitled also to an action of exhibition *ad deliberandum, i.e.*, to see the title-deeds, and debts, and liabilities affecting the estate, in order to make up his mind whether it is for his advantage to be served heir; also to challenge any deeds done on deathbed. Bell's Com. by Shaw, 1029, 1031.

But to complete his title, he must be served heir. Service is a judicial proceeding for transmitting or vesting the succession. It is either special or general; the former establishes his right to enter and be infeft in special lands, the latter establishes his general title as heir in the general *hereditas* of the deceased, without application to any particular subject. The mode of proceeding is chiefly regulated by 10 & 11 Vic. c. 47; see also 21 & 22 Vic. c. 76, § 11.

[6] *Contra;* he may decline to enter as heir.

sell the estate next day, or alienate it without consideration, subject to the intestate's debts, if any. If his ancestor was indebted, then the estate is in general bound in the heir's hands for such debts.

781. *Heir-at-law's liability for debts of ancestor.*—The heir is only liable for the ancestor's debts to the extent of the value of the real estate, and in general he cannot be liable beyond that, in the absence of express contract.[1]

782. And he does not require to take any precautions or other active steps to restrict his liability [2] to that extent, as he is not considered *eadem persona cum defuncto*, and has no risk to run beyond losing the estate for the ancestor's debts.

783. Hence also, where A's heir-at-law H has been in possession of the real estate of A for a time, and then dies intestate, I, the heir of H, can only take the estate of A, subject, *primarily*, to the debts of A, and, *secondly*, subject to the debts of H.[3]

784. And where H, the heir-at-law, enters upon the estate of A, it still continues liable for A's debts, however long H may be in possession,[4] provided the prescriptive period has not expired. H's creditors will be postponed to A's creditors, *quoad* that estate.[a]

[a] *Kinderley* v. *Jervis*, 22 Beav. 1.

IN SCOTLAND.

[1] *Contra;* the heir incurs what is called a passive title, and is in general liable for all the debts of the deceased, quite irrespective of the value of the heritable estate, unless he take certain precautions. Bell's Pr. § 1916, *et seq.* This is called universal passive representation, which is incurred by certain irregularities, viz., either by entry as heir, by *præceptio hereditatis* (voluntary conveyance to the heir E), or *gestio pro herede* (acting like an executor *de son tort*, as to real estate E). See 21 & 22 Vic. c. 76, § 27.

[2] *Contra;* to restrict the heir's liability to the extent of the real estate, he must, within a year, serve himself as heir *cum beneficio inventarii* (*i.e.*, register an inventory of the real estate E), or be served heir with specification. 10 & 11 Vic. c. 47, § 23, 25.

[3] If H, an apparent heir, has entered upon and continued in possession for three years and upwards, and then died, without making up his title to A, then I, the next heir, must serve himself heir to A, but in that case will be personally liable to the extent of the value of the estate for all H's onerous debts. Yet it required a stat. 1695, c. 24, to make I liable to this extent. *Smith* v. *Harris*, 16 D. B. M. 727; *Brown* v. *Henderson*, 14 D. B. M. 1041; *Taylor* v. *Hutton*, 26 Sc. Jur. 450. Bell's Com. by Shaw, 1031.

[4] *Contra;* the creditors of A must do diligence within three years, otherwise H, the heir in possession, and his creditors, may acquire priority over A's creditors in respect of the estate. Stat. 1661, c. 24; Bell's Pr. § 1932.

785. *Exoneration of the real estate.*—The general rule is, that all the debts of the deceased must be paid out of his personal estate, unless there is an express or implied intention of the testator to the contrary; and if the heir-at-law or devisee is sued and made to pay any of these debts, he is allowed to stand in the place of the creditor, and to reimburse himself out of the personal estate in the hands of the executor.[1]

786. In all specialty debts, where the intestate has expressly bound his heirs, either the heir or the executor[2] may be sued by the creditor; and if the heir pays the debt, he is entitled to be reimbursed by the executor.

787. But the personal estate is not primarily liable to pay the debts of the deceased, where the testator has shown an intention to exonerate it, and to charge the real estate with such debts,[a] as where he expressly devised the real estate or some other fund for the payment of the debts; where the debt or charge is in its own nature real, as a jointure or portion out of certain lands; or where the debt was not a proper debt of the deceased, but was a debt of an ancestor, unless such heir has by some act made the debt his own.[b]

788. There is also an exception as to real estate which is mortgaged, for now, since 1854, the heir is not entitled to call upon the executor to pay off the mortgage debt, but he must pay it himself, the land being considered the primary fund as between the heir and the personal representatives of the deceased.[c][3]

[a] 2 Spence's Eq. Jur. § 336, 824.
[b] Story's Eq. Jur., § 571, 1003; 2 Spence's Eq. Jur. 334, 393, 819, 824.
[c] 17 & 18 Vic. c. 113.

IN SCOTLAND.

[1] The order of responsibility among heirs is as follows:—Where in the obligation particular heirs are bound, these are first to be called upon. Where the debt is a burden on a particular subject, the heir taking that subject is liable *prima facie*. Where the debt is properly heritable, the heir of line is primarily liable, and is bound to relieve the heir of provision or of conquest. The creditor must sue and discuss the heirs in a certain order, viz., first the heir of line, next the heir of conquest, then the heir of provision, then the heir of marriage. Bell's Pr. § 1935; *Stewart* v. *Campbell*, 24 Sc. Jur. 217.

[2] *Contra;* whether the heir or the executor is primarily liable depends on whether the debt is heritable or moveable. If the debt is heritable, the heir alone must be first sued. See last note.

[3] The same at common law. Bell's Pr. § 1935.

789. *Order of applying assets in equity.*—The order in which a court of equity applies the assets in payment of the debts is as follows:—*First*, The general personal estate is applied, subject to the qualifications stated, *ante*, § 787. *Secondly*, Any estate which has been particularly devised simply for the payment of debts. *Thirdly*, Estates descended. *Fourthly*, Estates devised to particular devisees, but charged with the payment of debts. *Fifthly*, Lands comprised in a residuary devise. *Sixthly*, Specific legacies and lands specifically devised. *Seventhly*, Freehold estates over which the testator had a general power of appointment, and which he had appointed by his will.[a]

790. *Executor throwing estate into Chancery.*—An executor or administrator of a person deceased, who finds the estate burdened with a complication of liabilities, is entitled to devolve the administration upon a court of equity by filing a bill, or a claim, or summons, in an administration suit.[1] He is then relieved from all liability, and has only to abide the orders of the court.[b] He may also, without instituting a suit, obtain the opinion of a court of equity, and if he act thereupon will be protected.[c] [2]

791. *Creditor's remedy against estate of deceased.*—A creditor of a deceased person may either sue the executor or administrator in a court of law, if an action lies; or he may file a bill or claim, or take out a summons in an administration or creditor's suit in a court of equity, whether he could or could not sue for his debt in a court of law. Until a decree is made by the court of equity, the executor, in general, is entitled to go on paying the debts in the order of preference prescribed by law for legal assets; but when such decree is made, it is considered a decree for all the creditors, who thereafter share, subject to the qualifications stated *ante*, § 690-2, 787,

[a] Story's Eq. Jur. § 577; 2 Spence, 817.
[b] 15 & 16 Vic. c. 86, § 42, Rule 6th; 7th & 8th Orders, 22 Ap. 1850; 13 & 14 Vic. c. 35, § 19, *et seq.*
[c] 22 & 23 Vic. c. 35, § 30.

IN SCOTLAND.

[1] The executor is also entitled to raise an action of multiplepoinding, which brings all the creditors into the field, and a decree protects him in a similar manner; but he must be pressed by double distress, to entitle him to such a remedy.

[2] *Contra*; this is not competent to an executor.

789.[1] But the estate of a deceased person cannot be declared bankrupt and divided amongst the creditors in the Court of Bankruptcy.[2]

792. *Administration in Chancery.*—The chief clerk[3] of the Vice-Chancellor or Master of the Rolls, in lieu of the Master in Chancery, superintends the progress of the suit, and creditors appear and compete before him until the order of distribution is finally settled. The Court, if necessary, orders a sale of the real or personal estate for the purpose of meeting all the claims.

IN SCOTLAND.

[1] So an action of ranking and sale may be commenced, and upon evidence that the debts exceed the value of the estate, the Court will authorize a sale, all the creditors being brought into the field. *Gordon* v. *Campbell*, 1 Bell's Ap. 563; *Ferrier* v. *Gartmore*, 6 W. S. 155. A judicial factor may also be appointed by the Court to sell the heritable estate. Personal creditors can attach the estate for their debts.

[2] *Contra*; the estate of a deceased person may be sequestrated, and the same proceedings taken as in the ordinary case when the debtor is alive.

[3] *Contra*; if the estate of the deceased is sequestrated, the trustee in the sequestration divides the funds. If a ranking and sale is the process, the common agent appointed reports to the court the order in which the creditors rank. If a judicial factor is appointed, he also divides the proceeds among the creditors.

PART IV.

PERSONAL AND DOMESTIC RELATIONS.

CHAPTER I. LUNATICS—ALIENS—FELONS—INFANTS.

II. MASTER AND SERVANT.

III. PARENT AND CHILD.

IV. MARRIAGE.

CHAPTER I.

LUNATICS—ALIENS—FELONS—INFANTS.

800. *Lunatics and idiots.*—No man could at common law be deprived of the right of dealing with his own property, and disposing of his own person, except by the verdict of a jury.[a] The incapacity of a lunatic or idiot to contract is now conclusively established by the verdict of a jury, under an inquisition *de lunatico inquirendo*, held before a master in lunacy, or in cases too clear for a jury, by a certificate of a master in lunacy.[b] [1] The Lord Chancellor, and the Lords Justices in Chancery, as the delegates of the Crown, then appoint a committee of the estate, and of the person.[2] The lunatic must be visited once a year by one of the visitors in lunacy.[c] [3]

801. A lunatic sued on a contract may set up lunacy as a defence,[4] and does not require to file a bill in equity to set aside any deed or document made during lunacy; though it is competent for him to do so.

[a] 4 Rep. 127; 8 Rep. 170; Exp. Cranmer, 12 Ves. 449.

[b] 16 & 17 Vic. c. 70, § 42, 43.

[c] *Ibid*, § 104.

IN SCOTLAND.

[1] The term most used for lunacy is furiosity, and that state of mind is established by an inquest before the sheriff, on a brieve of furiosity. Ersk. 1, 7, 50. The party is then said to be cognosced as a fatuous or furious person. The term idiot is used in the same sense as in England.

[2] The Court appoints a *curator bonis* or judicial factor as to the estate of a furious or fatuous person, and a curator, or tutor-dative as to the person. These curators and factors are subject to the provisions of the stat. 12 & 13 Vic. c. 51. As to the inherent powers of the Court of Session to interfere with lunatics not cognosced, see *Bryce* v. *Graham*, 2 W. S. 481. The Court will appoint a *curator bonis* or judicial factor before any inquisition has taken place. The nearest male agnate of twenty-five is entitled on finding security to be tutor-at-law, and as such to take charge of the estate. Ersk. 1, 7, 6.

[3] A lunatic must be visited twice a year by the Commissioners. 20 & 21 Vic. c. 71, § 17.

[4] *Contra;* a cross action of reduction is in general necessary. See *Pollock* v. *Paterson*, 10th Dec. 1811, F. C.

802. *Weak-minded persons.*—Where a person is of weak mind, but not so low in degree as to warrant a verdict of insanity, or a certificate of a master of lunacy, there is no mode by which a court of law or equity can lay a restraint on his power to deal with his real property as he pleases.[1] Yet such weakness may be a strong element of fraud, so as to lead a court of equity to set aside any deed or document obtained from him by undue advantage. He might, moreover, convey his real estate to trustees.

ALIENS.

803. *Aliens.*—The rights of aliens are now regulated chiefly by statute.[a 2]

FELONS.

804. *Felons, etc.*—A felon, *i. e.*, one found guilty of felony, forfeits his personal estate,[3] which goes to the Crown, strictly speaking, though it is generally in practice re-granted to the relatives. A felon is also liable to disabilities in suing. If the crime is a capital felony, he forfeits both his real and personal estate. Where a person is found

[a] 7 & 8 Vic. c. 66.

IN SCOTLAND.

[1] *Contra;* a weak-minded person may put himself or be put under a ban, called *interdiction*, which may be judicial or voluntary, and has the effect of rendering the consent of certain persons, called interdictors, necessary to all deeds affecting heritable estate granted by him. Bell's Pr. § 2123. The party may grant, for that purpose, a bond of interdiction. If the consent of the interdictors is not obtained to deeds and contracts, and there is lesion (prejudice E), these are voidable and may be set aside. The interdiction must be first registered in the Register of Inhibitions. Ersk. 1, 7, 54; 2, 11, 4; stat. 1581, c. 119. The effect of interdiction is thus to enable the interdicted party, on proof of non-consent of his interdictors and lesion, to set aside all deeds affecting his heritable estate; but it does not affect his moveable estate. Ersk. 1, 7, 57; Bell's Pr. § 227; M. 7142; *Kyle* v. *Kyle*, 5 S. D. 128; *Mansfield* v. *Stewart*, 3 D. B. M. 1103; *Lockhart*, 19 D. B. M. 1075.

[2] The statute extends to Scotland.

[3] There is no division into felony and misdemeanour. In capital crimes except treason, the criminal forfeits only his moveable property, but in lower crimes he forfeits nothing. 2 Hume, Cr. L. 482.

guilty of a misdemeanour, he forfeits neither his personal nor his real estate.

INFANTS.

805. *Infants, who are.*—An infant is a person under twenty-one, and there is no distinction as to capacity to contract between the ages of pupillarity and non-pupillarity.[1]

806. *Contracts of infant.*—Contracts, except by deed, made by an infant, are not absolutely void, but are voidable only at the infant's option.[2] Though the infant is not himself bound, the other contracting party is bound. And in the case of breach of promise of marriage, though the infant can sue if the other party is a major, yet he cannot be sued.[a] But in equity, specific performance of a contract will not be enforced against the one party where the other is an infant and so not mutually bound.

807. *Infant's contract for necessaries.*—An infant, however, can always bind himself[3] for necessaries, if not otherwise provided;[b] though he cannot, it seems, contract for these by way of a bill, bond, or deed.[c]

[a] *Holt* v. *Ward*, 2 Str. 937.
[b] *Bainbridge* v. *Pickering*, 2 W. Bl. 1325; *Story* v. *Perry*, 4 C. & P. 526.
[c] *Harrison* v. *Cotgreave*, 5 C. B.; *Touch* v. *Parsons*, 3 Burr. 1801; *Madden* v. *White*, 3 T. R. 161.

IN SCOTLAND.

[1] *Contra;* a male under fourteen and a female under twelve are called pupils. From fourteen or twelve until twenty-one they are called minors. The capacity of a minor to contract differs from that of a pupil. See *post.*

[2] *Contra;* the contracts of pupils are absolutely void. Ersk. 1, 7, 14; *M'Gibbon* v. *M'Gibbon*, 14 D. B. M. 605. As to minors, they are in general voidable only on proof of lesion. But if the contract or deed is made by the tutors of the pupil, it is not absolutely void, except as regards the sale of the pupil's heritage, but only voidable, and that within four years after majority by the pupil challenging such deed. M. 2184; 2 Fraser, D. R. 61. The tutor's powers of management are extended by 12 & 13 Vic. c. 51. He requires authority of the Court to sell the pupil's heritage, and it will only be granted in cases of necessity. Ersk. 1, 7, 17; M. 16,389; *Boyle*, 15 D. B. M. 420; *Muller* v. *Dixon*, 16 D. B. M. 536; *White*, 17 D. B. M. 599.

[3] *Contra;* a pupil cannot bind himself, though his property will be liable for necessaries furnished. The proceeding to sell the pupil's estate for debt is an action of cognition and sale. A minor may bind himself for necessaries by writing, bill, or deed. M. 8927.

808. *Liability of infant's father for necessaries.*—A father or mother is not liable for necessaries supplied to the child, unless an express or implied contract can be made out against the parent.[1] Hence, if a stranger find the child utterly destitute, and maintain it, such stranger cannot sue the parent for the money so expended. Slight evidence of a contract, however, will be seized on to fix this liability. If the infant lives in the father's house, and the father has given him what he considers a sufficient sum for necessaries, the father will not easily be made liable for more; but if no such allowance has been made, very slight circumstances, such as the clothes having been delivered at the father's house, and having been seen by the father, will suffice as evidence of an implied contract on the part of the father to pay. Where the infant does not live in the father's house, the difficulty of fixing an implied contract on the father is greatly increased.

809. *Infant's contracts not for necessaries.*—The infant's contracts for things not necessaries, are voidable only, and not void, but they are in general voidable at the infant's option, without any proof of damage or prejudice.[a 2]

810. *Infant in trade.*—Though the infant pursue a business for a livelihood, and make contracts in the course thereof, these are voidable as in other cases.[b 3] In like manner infants cannot be made bankrupts.[c 4]

[a] *Warwick* v. *Bence*, 2 M. & S. 205; *Holt* v. *Ward*, 2 Str. 937.

[b] *Dilk* v. *Keighley*, 2 Esp. 480; *Lowe* v. *Griffith*, 1 Scott, 458.

[c] *Belton* v. *Hodges*, 9 Bing. 365.

IN SCOTLAND.

[1] *Contra;* a father or mother is bound, *ex debito naturali*, to aliment the child; but to supply bare aliment only, and not luxuries suitable to the child's rank. *Maule* v. *Maule*, 1 W. S. 276. The obligation does not result from contract, though that may be superadded.

[2] *Contra;* as to pupils, their contracts, unless made by their tutors, are void; as to minors, voidable only in certain cases. A minor may bind himself if he has no curators; but if he has curators, and they do not concur with him, the contract is voidable at his option; and even if they do concur, he may, within four years after majority, reduce it on proving lesion. *Wallace* v. *Wallace*, 8th March 1817, F. C. There is no distinction between contracts for necessaries, and not for necessaries merely as such.

[3] *Contra;* a minor's contracts in business, or in the way of a livelihood, are not voidable. He can carry on trade like other persons. Ersk. 1, 7, 38; M. 9027; *Crawford* v. *Bennet*, 2 W. S. 608.

[4] *Contra;* as a minor can trade, so he can be made bankrupt.

Infants.

811. *Deeds of infant.*—Deeds granted by an infant are in general absolutely void, and not merely voidable, except leases and contracts which are beneficial to the infant or his real estate;[a] or marriage settlements made with leave of the Court of Chancery.[b][1] If, after majority, he wishes to ratify them, he must re-execute and re-deliver the deeds.

812. *Infant cannot make a will.*—Infants cannot make a will of real estate.[c] Nor of personal[2] estate.

813. *Infant, when of age, ratifying contract.*—When he has arrived at maturity, the contract made by the infant may become binding if he expressly ratify or confirm it; which ratification must be in writing, signed by himself.[d][3] In one case only does he require to disaffirm it, namely, where it was a continuing contract; and slight negative evidence of ratification of this will suffice.

814. *Infant, when of age, disaffirming contract.*—In other cases the infant need not disaffirm the contract at all, nor in general file a bill in equity to set aside any deed granted.[4] It is enough for him to set up

[a] *Oliver* v. *Woodroffe*, 4 M. & W. 650; *Maddon* v. *White*, 2 T. R. 161.
[b] 18 & 19 Vic. c. 43.
[c] 1 Vic. c. 26.
[d] 9 Geo. IV. c. 14, § 5.

IN SCOTLAND.

[1] *Contra;* a minor's deeds, if granted in trade, are valid; and otherwise are reducible only for lesion. Ersk. 1, 7, 35. The curators, however, if any, must have consented to the deed; unless the consideration for the deed was *in rem versum, i.e.*, to the minor's profit; *Denniston*, 12 D. B. M. 613; *Bruce*, 17 D. B. M. 264; or the minor was guilty of fraud. 2 Fraser, D. R. 209. A pupil's deeds are absolutely null.

[2] *Contra;* a minor can make a will of moveable estate (M. 8966), but not a disposition *mortis causa* of heritable estate, whether with or without his curator's consent. Ersk. 1, 7, 14; M. 8966; 2 Fraser D. R. 212. But he may sell real estate with their consent and bequeath the purchase-money.

[3] *Contra;* homologation or ratification of a contract by a minor need not be by writing, any more than if he were of age. Ersk. 1, 7, 39; *Dempster* v. *Potts*, 15 S. D. 364; *M'Gibbon*, 14 D. B. M. 605.

[4] *Contra;* the minor in few cases can plead minority by way of exception, and requires, by a separate action of reduction, or by reduction being repeated in the course of the action, to reduce all deeds granted with consent of his curators, if any, and that must be done by himself or his heirs raising an action, and not merely setting up a defence within four years after majority, called the *quadriennium utile*. Ersk. 1, 7, 34; *Snodgrass*, 23 D. B. M. 187. He must prove lesion or prejudice, and on doing so, is entitled to restitution. But if the deed is null on other grounds, as

infancy as a defence to any action brought on the deed or contract. But he may take the initiative, and file a bill in equity if he chooses. So there is no particular period after majority when he must file a bill for an account against his guardian; but acquiescence and express ratification will often disentitle him to his remedy.

815. *Defence of infancy.*—The defence of infancy is in general good,[1] however beneficial the contract may have been to the infant.

816. *Infant recovering back money paid.*—If the infant has paid money on a contract during infancy, he can recover it back at majority, by an action for money had and received, if he used no deceit, and has had no intermediate advantage from it.

817. *Infant's misrepresentation.*—If an infant, by fraudulent misrepresentation that he is of full age, procures a contract to be entered into, he will not be liable[2] upon it; nor on the other hand will a court of equity help him to enforce its specific performance.[a]

818. *Infant sues in its own name.*—A father cannot maintain an action of damages in his own name for assaulting or maltreating his child;[3] but the child sues in all cases in its own name, coupled with a *prochein ami* or next friend, who may be, and generally is, the father. The *prochein ami* is responsible for costs.

819. *Guardians of child.*—A father is the natural guardian of his children during infancy, and he may appoint a guardian for them either by a deed or by a will, and failing such appointment,

[a] *Bartlett* v. *Wells*, 1 B. & S. 836; *Cory* v. *Gcatchen*, 2 Madd. 40.

IN SCOTLAND.

on the ground of the curators not consenting, the minor is not limited to the *quadriennium utile*. *Manuel*, 15 D. B. M. 284. So within these four years he must call the curators to account for any irregularities they may have committed. So a pupil's deeds and contracts made for him by his tutors may be challenged within four years after he attains majority.

[1] *Contra*; the minor must, in general, prove lesion as the natural result of the transaction, unless the contract was made without the concurrence of the curators, in which case lesion is presumed; but if he can be shown to have profited, the presumption of lesion will be removed. M. 8941; *Forest* v. *Campbell*, 16 D. B. M. 16; 2 Fraser, D. R. 232.

[2] It seems the same. Bell's Pr. § 2088; *Dennistoun* v. *Mudie*, 12 D. B. M. 613; *Sutherland*, 19 Jan. 1825.

[3] *Contra*; the father can sue in his own name as administrator-in-law. *Findlater*, 1 Rob. Ap. 911; *Milne*, 3 D. B. M. 1163; *M'Connochie*, 9 *ibid.* 791; *Cattanach*, 20 *ibid.* 1206. But he may be required to give caution if insolvent; M. 16,263; *Dumbreck*, 4 Macq. H. L. C. 80.

the mother becomes such guardian.[1] A mother cannot appoint a guardian by will or otherwise, though she survive the husband.[a] When an infant has no guardian, the Court of Chancery, as the delegate of the Crown, has a right to appoint one.[b] This is always done when there is a suit depending relative to the infant or his estate, and in that case the infant becomes a ward of court. But the court may also appoint a guardian; though there is no suit depending; the infant, however, in such a case, does not become a ward of court. When infants are appointed wards of court, they are not allowed to marry, except with the leave of the court; and parties attempting to effect or promote a clandestine marriage, are guilty of a contempt of court. A person marrying a female ward clandestinely, may be committed to prison for the contempt, and not discharged without making a settlement upon his wife.[c]

[a] *Ib.*; *Villareal* v. *Mellish*, 2 Sw. 536.
[b] *Butler* v. *Freeman*, Amb. 301; Story Eq. Jur. § 1333.
[c] *Winch* v. *James*, 4 Ves. 386; 2 Tudor's L. C. 468.

IN SCOTLAND.

[1] So the father is administrator-in-law of his children, that is, he is tutor during their pupillarity, which as to males, is under the age of fourteen, and as to females is under twelve; and he is curator during their minority, *i. e.*, between twelve or fourteen and twenty-one. But his natural guardianship ceases as to minors who are forisfamiliated, subject to the rights reviving if the child return to his family. The father is not subject to the same strict responsibility as other curators. The father can also, by deed executed in *liege poustie*, appoint tutors and curators, thence called tutors and curators nominate, and can limit their responsibility. Stat. 1696, c. 8. *Graham*, 14 D. B. M. 357. And a stranger can appoint a special guardian, if he gives also property to be protected. If there is no tutor-nominate, then one of certain relations is entitled to be served tutor-at-law to the pupil, viz. the nearest male agnate, unless he is next heir. Bell's Pr. § 2078. Failing a tutor-at-law, the Court of Session appoints a tutor-dative or judicial factor. 12 & 13 Vic. c. 51. In like manner, during minority, in default of the father or curators-nominate, the minor himself may name curators upon citing two of his nearest of kin. The Court will not undertake the management of the estates of minors, who can choose curators. *Macarthur*, 17 D. B. M. 61; Menz. Conv. 31. Tutors have control over the pupil's person, but curators have not over the minor's person. A minor can marry without the concurrence of his curators.

CHAPTER II.

MASTER AND SERVANT.

821. *Contract, how far in writing.*—A contract of hiring servants must, by the Statute of Frauds, be in writing if for more than a year. [a] [1] If for an indefinite time, determinable on a certain notice, then writing is not necessary.

822. *Writing to be signed.*—When the writing is necessary, it must be signed by the party or his or her agent, but need not be by deed; [2] it must state on the face of it some consideration. [b] [3]

823. *Verbal contract.*—A verbal contract for more than a year is not good even for one year. [c] [4] And part performance, except in the case of artisans, etc., will not set up the contract for a longer term.

824. *Earnest money.*—Earnest, *i.e.*, part payment of wages, has no effect whatever in making the contract more binding on either party than it would be without it. [5]

825. *General hiring.*—Where a domestic or menial servant is hired generally, no term being specified, the hiring is presumed to be for one year. [d] The same is the rule as to other servants, [e] unless

[a] 29 Ch. II. c. 3, § 4; *Bracegirdle* v. *Heald*, 1 B. & Ald. 722.
[b] *Sykes* v. *Dixon*, 9 A. & E. 693.
[c] *Bracegirdle* v. *Heald*, 1 B. & Ald. 722.
[d] Per Parke B. in *Turner* v. *Mason*, 14 M. & W. 112; *Fawcett* v. *Cash*, 5 B. & Ad. 901.
[e] *Bailey* v. *Rimmell*, 1 M. & W. 506.

IN SCOTLAND.

[1] The same. Ersk. 1, 7, 62; Bell's Pr. § 173, 190.

[2] *Contra;* if the contract is in writing, it must be probative or holograph, *i.e.*, either in the party's handwriting, or by way of a deed, unless there has been *rei interventus*. 2 Fraser, D. R. 373.

[3] *Contra;* the consideration is not required to appear *ex facie* of the writing.

[4] The same. *Paterson* v. *Edington*, 8 S. D. 931. When there is *rei interventus*, which, if inconsistent with a shorter contract, will make the contract good for the whole term, see *Napier* v. *Dick*, Hume, 388; 2 Fraser, D. R. 375.

[5] It seems the same. 2 Fraser, D. R. 376.

some special custom be imported from the locality indicating a different period, as sometimes happens in the case of agricultural servants.[1] A custom in a particular trade may also override the general presumption with regard to other servants.[a]

826. *One servant injuring another.*—Where one servant negligently injures or causes the death of a fellow-servant in the course of a common operation in which they are engaged, the master is not liable for the damages caused by such tortious act of one towards the other, unless he can be shown to have been guilty of some negligence in employing or retaining the servant who caused the injury.[2]

827. *Specific performance of contract.* — A contract of hiring domestic, agricultural, or other servants, will not be ordered by a court to be specifically performed, whether the servant has entered upon the service or not; the only remedy being an action of damages for breach of contract, which, considering the station in life of the servant, is seldom resorted to by the master for redress. Much less can a servant, who refuses to serve, be compelled to give bail to do so, or be imprisoned.[3] But it is otherwise by statute as regards artificers, workmen, and certain apprentices, who can be convicted and imprisoned for absenting themselves without lawful excuse.

828. *Notice to leave.*—The general rule as to domestic and menial servants is, that, if the hiring is by the year or indefinite, called a defeasible yearly hiring, one month's notice[4] on either side puts an

[a] *Baxter* v. *Nurse*, 6 M. & Gr. 935.

IN SCOTLAND.

[1] *Contra;* the contract of general hiring is only for six months as to domestic servants, but in the case of agricultural servants it is for a year. Bell's Pr. § 174.

[2] The same. *Bartonshill Coal Co.* v. *Reid*, 30 Sc. Jur. 597; 3 Macq. 266, 300.

[3] Old decisions sanction this common law jurisdiction, especially in the case of workmen, artificers, etc., but it is now seldom or never exercised, and is obscure. The Court of Session also refuses to order implement of a contract of hiring, and justices of the peace confine their action to the Master and Servant Acts, 4 Geo. IV. c. 34; 10 Geo. IV. c. 52; 5 Geo. IV. c. 96. See *Murray* v. *Bisset*, 15th May 1810, F. C. Baird on Master and Servant, 173.

[4] *Contra;* the hiring, which in that case will be for half a year, cannot be put an end to without forty days' previous warning, and until the half-year is ended; and if dismissed without notice, and not for misconduct, the servant can claim, not only wages, but board wages till the end of the term. Ersk. 3, 3, 16; *Cooper* v. *Henderson*, 3 S. D. 425.

end to the hiring at any time of the year. Hence any person can in general dismiss a domestic servant at any moment without cause, by paying a month's wages in advance, in which amount board wages are not included.[a]

829. As to agricultural and other servants, the yearly hiring is indefeasible, and can only be put an end to, unless for misconduct, by some notice, whether a month's or other notice, specially agreed upon or implied by the custom of the locality; but such notice must expire at that period of the year at which the hiring commenced.[b] [1]

830. Where a hiring is for a time certain, no notice on either side is necessary to terminate the contract.[2] If, however, the time expire, and the servant continue without anything being said, a fresh hiring on the same terms for a year, or other lesser period equal to the original time agreed upon, would be presumed.[3]

831. *Death of master.*—When a master dies, the servant is thereby discharged, but is not entitled to any wages for the broken time, unless there is some custom to the contrary as in the case of domestic servants, who are, however, entitled only to wages for the period actually served up to the death, and not for the whole current term.[4]

832. Moreover, the servant's wages are not a privileged debt

[a] *Nowlan* v. *Ablett*, 2 C. M. R. 57; 2 Smith, L. C. 1. [b] *R.* v. *Lyth*, 5 T. R. 327.

IN SCOTLAND.

[1] The same. See last note.

[2] *Contra;* forty-eight days' warning is necessary, even where the hiring was for a time certain, otherwise by tacit relocation a new engagement for a half-year or year will arise, if the servant does not waive notice, which he may do by acts or conduct amounting to a dispensing with warning. Ersk. 2, 6, 35; *Morison* v. *Allardyce*, 27th June 1823; *Finlayson* v. *Mackenzie*, 6th June 1829.

[3] The same, there being what is called tacit relocation, *i.e.*, an implied re-hiring for another like period.

[4] *Contra;* the servant can claim wages for the whole term; and if no warning has been given, when it is necessary, for one term more after the master's death. But it is the duty of the servant to look out for another situation on the master's death, if the executors do not, as they are entitled to, claim the servant's services. It is only in the event of no new situation being obtained, that the executor is liable. M. 13,999; 2 Fraser, D. R. 449; Ersk. 3, 3, 16; Bell's Pr. § 180-7.

against the master's estate in the event of the master's death; and the servant is on the footing of an ordinary creditor.[1]

833. *Bankruptcy of master.*—But in the event of the master's bankruptcy, the servant's wages, if not exceeding a certain sum, are privileged to the extent of three months, leaving the servant to prove for the remainder like ordinary creditors.[a 2]

834. *Servant's death.*—Where the servant was engaged for a year, at wages payable yearly, the contract is entire and indivisible, and if such servant die in the middle of the year, his or her executors cannot recover wages in proportion for the time actually served.[b 3] But if the contract was mutually abandoned, or it seems if the servant was a domestic servant, the wages, *pro rata*, are recoverable.[c]

835. *Servant's wages in case of a distress.*—Where a landlord, or the owner of a rent-charge, distrains the master's goods or crops for rent, the servant of the master, whose goods are so distrained, has no privilege or priority of claim for his or her wages out of the proceeds of such distress.[4]

836. *Limitation of actions for wages.*—An action for wages may be brought any time within six years after the time at which they are due;[d 5] but if so long a time elapse, a jury will be slow to believe any evidence of non-payment, especially if no claim had been made, and the delay satisfactorily accounted for, the presumption being that wages are paid promptly.

[a] 12 & 13 Vic. c. 106, § 168.
[b] *Plymouth* v. *Throgmorton*, Salk. 65; 6 T. R. 326; *Cutter* v. *Powell*, 2 Smith, L. C. 1.
[c] *Ibid*; *Lamburn* v. *Cruden*, 2 M. & Gr. 252; *Philips* v. *Jones*, 1 A. & E. 333.
[d] 21 Jas. I. c. 16.

IN SCOTLAND.

[1] *Contra*; servants are entitled to be paid their wages for the current term before ordinary creditors, in the event of the master's death. Ersk. 3, 9, 43; Bell's Pr. § 1404.

[2] *Contra*; they are also privileged, but to the extent of wages and board-wages for the current term. M. 11,832; 19 & 20 Vic. c. 91, § 122.

[3] *Contra*; the wages and board-wages for the time actually served may be recovered. Maclean, 4th Feb. 1813, F. C. See *ante*, § 831 *n*.

[4] *Contra*; there is a preference given to wages due to a bankrupt tenant's agricultural servants, and it would seem also to domestic servants, who are privileged over the landlord's hypothec and poinding of the ground. *M'Glashan* v. *D. Athole*, 29th June 1819, F. C.; *Preston* v. *Gregor*, 26th June 1845. *M'Lean* v. *Phillips*, 10 S. D. 217.

[5] *Contra*; in three years; the triennial prescription applies expressly to wages of servants. Stat. 1579; c. 83; see *ante*, § 492 *n*.

837. *Attachment of wages.*—The wages due, but not yet paid, to a servant cannot be attached by the servant's creditor in the hands of the master, except in the city of London, until after judgment obtained against the servant; but after judgment there is no limit to the sum attachable, on the ground of part of it being necessary for the servant's maintenance.[a][1]

838. *Seduction of and injury to servant.*—A master or mistress has a right of action to recover damages against any person who seduces or injures the female servant, thereby causing a loss of service;[2] but the servant has no right of action in her own name for seduction.[b][3]

839. *Service with relations.*—When the servant has been in actual service with near relations, as with a parent, uncle, etc., a hiring is not presumed, as in other cases, from the mere fact of service; but an express contract must be proved in order to support the claim for wages, for the law regards services rendered by near relations as gratuitous acts of kindness and charity.[c][4]

840. *Workmen, artificers, etc.*—The law as to servants in husbandry, artificers, workmen, and apprentices, is regulated to some extent by statute; and justices of the peace have larger powers in enforcing their contracts than is competent to any court with regard to domestic servants.[d][5]

[a] C. L. P. Act, 1854.

[b] *Lumley* v. *Gye*, 2 E. & B. 216. See *ante*, § 512.

[c] *Davies* v. *Davies*, 9 C. & P. 87; *R.* v. *Low*, 1 B. & Ald. 181; *R.* v. *Stokesley*, 6 T. R. 757.

[d] 4 Geo. IV. c. 34; 5 Geo. IV. c. 96; 10 Geo. IV. c. 52.

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[1] All debts are arrestable both before and after decree, but an exception existed at common law and by the Small Debt Acts, 1 Vic. c. 41, § 7, and 8 & 9 Vic, c. 39, to this extent, that the surplus only of a servant's wages, which have become due, but are not yet paid, after deducting a reasonable sum for aliment or subsistence-money, could be arrested in the hands of the master. Hence a difficult question has often arisen, What is a reasonable sum for subsistence-money or aliment? which is obviously entirely a question of circumstances in each case. Ersk. 3. 6, 7; see *Shanks* v. *Thomson*, 14 D. B. M. 1353.

[2] This seems doubtful; *Allan* v. *Barclay*, 2 Macph. 873, *sed quære.*

[3] *Contra;* a female servant can also herself sue the seducer in her own name for a *solatium.* See *ante*, § 512.

[4] *Contra;* a servant who has actually served a near relation, is presumed to have been hired on the usual terms, and it lies on the master to show an express contract to the contrary. Hume's Dec. 394, 396.

[5] The Master and Servant Acts also extend to Scotland.

CHAPTER III.

PARENT AND CHILD.

841. *Legitimacy.*—A legitimate child is the offspring of parents lawfully married at the time of the birth, and there can be no legitimation *per subsequens matrimonium, i.e.*, by the subsequent marriage of the parents.[1] Nor is a child deemed to be legitimate where the parents *bona fide* believed[2] they were married, but were not in fact so.[a] A child born of an incestuous marriage in England, the parents being domiciled there, is illegitimate for the purposes of real succession in Scotland, though, from the fact of no suit of nullity having been promoted during the lives of the parents, there were no means of establishing the illegitimacy in England.[b]

[a] As to legitimacy of heir to real estate, see *ante*, § 751.

[b] *Fenton* v. *Livingston*, 31 Sc. Jur. 578.

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[1] *Contra;* Ersk. 1, 6, 49. A child, though born illegitimate, may be afterwards made legitimate by the subsequent marriage of the parents, by the doctrine of legitimation *per subsequens matrimonium.* This was said to proceed on the fiction that the marriage drew back (related back) to a period prior to the birth; but that fiction seems now exploded. *Kerr* v. *Martin*, 2 D. B. M. 752. The parties must have been under no legal impediment to marry at the time the child was born. Where, after the birth, one of the parents of the bastard has married and had children, and then both parents of the bastard have married, the quondam bastard does not take precedence of the other children. *Ibid.* If the marriage with the bastard's mother takes place on deathbed, and thereby the rights of presumptive heirs are displaced, this seems no ground for reducing the marriage *ex capite lecti.* Dirleton, 252; Bank. 1, 5, 57. Where the child is born out of Scotland, see *post*, Part VII. If a bastard were to die without heirs, it seems the subsequent marriage of the parents would not displace the crown as ultimus hæres. *Grant* v. *Grant's Trustees*, 32 Sc. Jur. 27; see M. 1354; Stair, 3, 2, 42. There is no presumption that the child of a woman who afterwards marries a man is the child of that man. *Innes* v. *Innes*, 2 Sh. & M'L.

[2] *Contra;* a child of a putative marriage, *i.e.*, where one or both of the parties *bona fide* believed the marriage was good, but it was not, is legitimate. 2 Fraser, Pr. 11. *Jolly* v. *M'Gregor*, 3 W. S. 85.

842. *Declaration of legitimacy.*—It is now in the power of any natural-born subject to present a petition to the Divorce Court, praying for a declaration that he is legitimate.[a][1] A child born after marriage, and though the mother was even visibly pregnant of it at the time of the marriage, is presumed to be the husband's.[b][2] But the presumption of paternity may be rebutted by strong evidence, other than the parents', of the impossibility or improbability of non-access.[c]

843. *Right of father to custody of child.*—A father has a right as against third parties to the custody of his legitimate child till the child's majority, and the courts will not deprive him of such custody, unless on strong grounds.[d][3] The Court of Chancery practically confines its control over this parental right to those cases where the infant is entitled to property; though, like the courts of common law, it also relieves in other cases against improper custody by granting a writ of *habeas corpus*. Where a child under sixteen—the age of nurture—is brought before a court of common law, and the father or guardian is not shown to be cruel or immoral, the child will be delivered up to the father or guardian; but if the child is above sixteen, it is entitled to choose where to go.[e] The Court of Divorce also may control the custody when arising out of suits there, but has no larger powers than other courts.[f]

[a] 21 & 22 Vic. c. 93.
[b] Co. Litt. 244 *a*; 1 Ph. Evid. 473 (10th ed.)
[c] Bull. N. P. 112; *St. George's* v. *St. Margaret's*, 1 Salk. 123.
[d] See Forsyth on the Custody of Infants.
[e] *R.* v. *Smith*, Str. 982; *R.* v. *Delaval*, 1 W. Bl. 412; *R.* v. *Clarke*, 7 E. & B. 186; *R.* v. *Howes*, 30 L. J., 47 M. C.
[f] *Ryder* v. *Ryder*, 2 Swab. 225.

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[1] So an action of declarator of legitimacy could always be raised; and the above statute also extends to Scotland.

[2] *Contra;* there is no presumption of legitimacy of the child, unless born more than six lunar months after the marriage. Ersk. 1, 6, 49; 2 Fraser, Pers. Rel. 1. The presumption of legitimacy may also be redargued by reasonable evidence of the impossibility of the husband's access to the wife. *Webster* v. *M'Kay*, 27 Sc. Jur. 207; Walker, 19 D. B. M. 290.

[3] *Contra;* children at puberty, *i.e.*, females of 12 and males of 14, become *sui juris*, and can marry, bequeath their moveables, and choose their own residence, without any control of their parents or any court. *Craig* v. *Greig*, 35 Sc. Jur. 670; *Marquis of Bute*, 4 Macq. H. L. C. 1. The father's control over a puber's person is nominal. *Ibid.*; *Harvey* 22 D. B. M. 1198.

Parent and Child.

844. *Mother's right of custody.*—The mother has, at common law, no right to the custody of the child as against the father; but Talfourd's Act[a] has enlarged her powers. Where the child is under seven, she can apply to the Court of Chancery for the exclusive custody till that age,[1] and afterwards she can apply for leave of access to the child at reasonable times. If, however, she has been guilty of adultery, or other misconduct, the court will refuse her this favour, and in all cases the court exercises a discretion as to granting or refusing the application. And the same discretion is vested in the Court of Divorce during suits in that court.[b]

845. *Obligation of parent and child to maintain each other.*—At common law a father is not bound to maintain his child. Hence, if a stranger find the child utterly destitute, and maintain it, he cannot sue the father for the expense. The father can only be made liable for the maintenance of the child by virtue of some express or implied contract to pay; yet very slight evidence will sustain such contract.[c 2]

[a] 2 & 3 Vic. c. 54.
[b] 20 & 21 Vic. c. 85, § 35.
[c] See *ante*, § 808.

IN SCOTLAND.

[1] *Contra;* the Act does not extend to Scotland, yet the Court assumes, as its *nobile officium*, the right to interfere on similar terms, and to appoint times and places for the mother to obtain access to her children. *M'Iver* v. *M'Iver*, 31 Sc. Jur. 619; *A.* v. *B.*, 10 D. B. M. 229.

[2] *Contra;* at common law a parent is bound *ex debito naturali* to aliment a child, and so is a child bound to aliment a parent. Other relations are liable also. The following is the order of primary liability:—*First*, a child is bound; then a grandchild and other descendants. *Muirhead* v. *Muirhead*, 1st February 1845. *Second*, the father. Ersk. 1, 6, 56. *Third*, the mother. *Ibid; Maidment* v. *Landers*, 6 Dow, 257; More's Stair, notes 29. Then the paternal grandfather and great-grandfather. The amount of aliment does not vary with the rank of the parties, and in all cases extends only to "support beyond want." *Maule* v. *Maule*, 1 W. S. 266. The party can raise an action for aliment.

The obligation to aliment a relation does not expire with the life of the party bound, but transmits to that party's representatives, at least so far as such representatives are *lucrati* by the succession. Hence an eldest or other son, though not liable as a brother to aliment his brothers and sisters, is nevertheless bound as having succeeded to the father's heritage or moveables. Ersk. 1, 6, 58, Ivory's note; M. 431, *et seq.*; *M'Conochie* v. *M'Conochie*, 2 Sc. Jur. 260; *Buchanan* v. *Morison*, 21st Jan. 1813, F. C. So the mother's heir or executor is likewise bound. M. 419, 440. The father's

So a child is not bound at common law to maintain its parent.[1]

846. If, however, a person is utterly destitute, *i.e.*, poor, old, blind, lame, or impotent, and not able to work, and thereby become chargeable to the parish, the Poor Law Act[a] compels the father, grandfather, mother, grandmother, or child, if able to support such person, to do so.[2] It must be first proved that such person is not able to work. It is not settled in what order these relatives are bound to support the pauper, and it seems they are all bound to contribute;[3] but the justices of the peace, in their discretion, generally single out the relative or relatives who are most able to bear the expense.

847. Brothers and sisters are not liable, either at common law or by statute, to maintain each other,[4] whether one or more of them have succeeded or not to all the father's property.

848. *Child's claim on father's estate.*—A father can, without any restriction, devise and bequeath his whole estate, real and personal, by will to strangers; and in such a case the child has no claim whatever to any part of such estate.[5] But in the event of the father

[a] 43 Eliz. c. 2, § 7. See also 5 Geo. IV. c. 83.

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heir is, however, only liable to continue the aliment till the brothers arrive at majority, and the sisters arrive at majority or marry, and no longer. M. 413, 419, 425, 450. The heir is liable in preference to the mother. M. 425; see also 2 Fraser, D. R. 43.

[1] *Contra.* Bell's Pr. § 1634; see last note.

[2] The same, as to fathers and mothers, by 8 & 9 Vic. c. 83, § 80. The Poor Law Act makes it punishable for a husband, father, or mother to neglect to aliment the wife and children respectively.

[3] *Contra;* they are primarily liable at common law in a certain order, viz., father, grandfather, great-grandfather, mother, grandmother, great-grandmother.

[4] *Contra;* though brothers and sisters are not bound to aliment each other merely as such, yet if one represents the parent and has been enriched by the succession, it is otherwise. See *ante*, § 845 *n*; Ersk. 1, 6, 58; More's Stair, notes 30.

[5] *Contra;* a father cannot bequeath more than a share of his moveable estate, and cannot dispone any of his heritable estate by will. He can, however, by a proper deed alienate and dispone his whole heritable estate *mortis causa* to strangers, provided he execute such deed in *liege poustie;* or, if suffering from the disease of which he afterwards died, provided he survived sixty days after its date, or went to kirk or market unsupported there-

dying intestate, the children are entitled, in a certain order, to succeed to the real estate; and all take a share in the personal estate under the Statute of Distributions.[a]

ILLEGITIMATE CHILDREN.

849. *Bastardy.*—As a parent is not bound at common law to maintain his legitimate child, neither is he bound to maintain his illegitimate child;[1] yet the Poor Law Statutes make both parents liable, for a certain time, to contribute.[b]

[a] See *ante*, § 739, 751. [b] 4 & 5 W. IV. c. 76, § 71; 7 & 8 Vic. c. 101.

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after. See *ante*, § 675. As to his moveable estate, the father, if his widow and children survive, cannot by will bequeath more than one third, and if his children, but not his widow survive, or *vice versa*, cannot bequeath more than one half of such estate. Another third, or the half respectively, belongs to the children as their *legitim.*

Legitim, or bairn's part, is due only to those children who survive the father; and if a child predecease the father, leaving children, these grandchildren take nothing. It is due to all the children by whatever marriage. If there is only one child, such child takes legitim, though also succeeding to the heritable estate; but if there are several children, one of whom succeeds to heritable estate, then he can only claim a share as legitim, after collating such heritable estate. Though a child is married, and living apart from the father's family, such child has nevertheless a right to legitim. Though a father is entire master of his moveable estate during his life, and by squandering it can reduce the fund for legitim, yet he cannot, on deathbed, by any deed fraudulently disappoint the children of their legitim. But the child's right to legitim may be excluded by an antenuptial contract, which expressly, or by strong implication, takes such right away. *L. Panmure* v. *Crokat*, 28 Sc. Jur. 297. A child may also renounce, or expressly discharge, his or her share of legitim, in which case he is said to be forisfamiliated, and such share accrues to the other children. So the legitim may be excluded by a provision given to and accepted by the child, with a condition that such acceptance shall discharge the legitim. But where a child has received a large sum "as her portion" on marrying an Englishman, the English settlement not expressly declaring it to be in satisfaction, it was held that the legitim was not thereby barred. *Breadalbane* v. *M. Chandos*, 2 Sh. & M'L. 377. Yet advances made to a child out of the moveable estate will count as between the children themselves as part payment of the legitim. See *ante*, § 742; Bell's Pr. § 1582, 1590; Ersk. 3, 8, 25; 3, 9, 15, *et seq.*; Stair, 3, 8, 45; *Keith's Trustees* v. *Keith*, 29 Sc. Jur. 497. Bell's Com. by Shaw, 681.

[1] *Contra*; both father and mother are liable at common law to support

850. The mother is bound by statute to maintain her illegitimate child till the age of sixteen, as part of her family; or if the child is a female, and marries under that age, then till marriage.[a] [1]

851. The father is also bound by statute to contribute to maintain the child, under the penalty of imprisonment. But the proceeding against the putative father to compel him to contribute, must be taken either within twelve months after the birth, or at any time thereafter, on proof that he had, within such twelve months, paid money for the child's maintenance.[b] [2]

852. The mother is entitled, as against third parties, to the custody of her illegitimate child till the age of seven, and it seems she (or her husband, if any) is entitled also to the age of sixteen.[3] Whoever marries a woman is expressly bound by statute to maintain her illegitimate as well as legitimate children till the age of sixteen.[c]

853. The courts decline to interfere in favour of the father, so as to give him the custody of his illegitimate child; all they do is of a negative kind, viz., where force or fraud has been used to change the custody, they will merely restore the child to the same custody it was in before such force or fraud was used.

854. *Filiation of bastards.*—The mother may affiliate the child on the father by applying to a justice of the peace for a summons of filiation. The alleged father may attend by himself or counsel, and

[a] 4 & 5 W. IV. c. 76, § 71. [b] 7 & 8 Vic. c. 101, § 2.
[c] 4 & 5 W. IV. c. 76, § 57.

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their illegitimate child, and such obligation to aliment transmits to the representatives of the father and mother. *Fleming* v. *Clarkson*, 30 Sc. Jur. 725; Ersk. 1, 6, 56. Also both parents are made liable, under pain of imprisonment, by the Poor Law Statute, 8 & 9 Vic. c. 83, § 80.

[1] *Contra;* the obligation to aliment the bastard continues on both parents for ever, if the child is not in business or otherwise provided. 2 Fraser, D. R. 41.

[2] *Contra;* the obligation continues on the father for ever, and an action of filiation and aliment can be raised at any time. See last note.

[3] The mother of illegitimate children is generally said to be entitled to the custody of daughters till ten, and sons till seven or ten. Bell's Pr. § 2062. But the age is not clearly fixed. Ersk. 1, 6, 56; M. 442, *et seq.*; see also *Goadby* v. *M'Candy*, 7th July 1815, F. C. If the father support the child after the above age, he is entitled to the custody. *Pott* v. *Pott*, 12 S. D. 183.

and the proceeding to affiliate is only competent within twelve months after the birth, unless the father paid money for its maintenance during such twelve months.[1] The mother's evidence must be corroborated.[2] The alleged father is a competent and compellable witness, the proceeding being civil, not criminal.[3] If he is adjudged to be the father, the utmost maintenance he can be made to pay is 2s. 6d. per week,[4] till the child is thirteen, or marry, when his obligation ceases; and the amount does not vary with his rank or means.[a] He cannot be arrested before an order of justices is made.[5]

855. *Bastard's will.*—A bastard has always been capable of making a will like other persons.[6]

CHAPTER IV.

MARRIAGE.

CONSTITUTION OF CONTRACT OF MARRIAGE.

858. *Marriage requires more than mere consent.*—Marriage cannot be constituted by mere present consent alone, however clearly ex-

[a] 7 & 8 Vic. c. 101, § 3.

IN SCOTLAND.

[1] *Contra;* the mother may at any time after pregnancy raise an action of filiation and aliment when the issue of paternity will be raised.

[2] The same. Her evidence was used to eke out a *semiplena probatio,* but she is now an ordinary witness. *Scott* v. *Chalmers,* 29 Sc. Jur. 57; *Lawson* v. *Eddie,* 23 D. B. M. 876; *Ross* v. *Fraser,* 1 Macph. 783.

[3] The same. *Kerr* v. *Hamilton,* 8th Feb. 1842. If he fail to attend, he may be held as confessed; *Mackellar* v. *Scott,* 34 Sc. Jur. 245.

[4] There is no other limit than necessary and reasonable aliment; but in practice the court awards from £4 per annum against labourers, etc., up to £10 against persons in better circumstances. But the father may get quit of his obligation by offering to maintain the child when above seven in his own house. *Corrie* v. *Adair,* 22 D. B. M. 897.

[5] *Contra;* he may, the moment she is pregnant, if he is *in meditatione fugæ. Davis* v. *Duncan,* 23 D. B. M. 532.

[6] *Contra;* until 1836 (6 & 7 W. IV. c. 22) he could not do so.

pressed, and however numerous the witnesses. At common law, verbal consent was held sufficient. But by various statutes there must, in addition to consent, be superadded some previous notice, by way of publication of banns, or license; either a clergyman of the Established Church or the registrar of the district must be present, with witnesses, at the ceremony or mutual declaration respectively; and the marriage must be in an authorised place, and at authorised hours.[a]

859. *Mere consent or acknowledgment.*—Hence a mere mutual declaration or acknowledgment of marriage *de presenti*, though proved, does not of itself constitute marriage.

860. *Promise and part performance.*—Nor is a promise of future marriage, however express, followed by *copula* on the faith of such

[a] 26 Geo. II. c. 33; 4 Geo. IV. c. 76; 6 & 7 W. IV. c. 85; 7 W. IV. c. 1; 1 Vic. c. 22; 3 & 4 Vic. c. 72; 19 & 20 Vic. c. 119; *R.* v. *Millis*, 10 Cl. & F. 534; *Beamish* v. *Beamish*, 9 H. L. Cas. 274.

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[1] *Contra;* a mere mutual interchange of consent *de presenti* to take each other for man and wife constitutes marriage. Ersk. 1, 6, 11; Stair, 1, 4, 5. The consent, as in other contracts, must be serious (*Lockyer* v. *Sinclair*, 8 D. B. M. 582), and sober (M. 13,915), and unconditional (*Stewart* 12 S. D. 179).

The consent may be proved either directly, by witnesses present at the time, or indirectly, by acknowledgments made at any time afterwards, either in words or writing, or by the oath of party on a reference. *Dalrymple*, 2 Hagg. 129. Acknowledgment may consist in the man seriously saying, "This is my lawful wife," to which she curtseys in assent. *Macadam*, 1 Dow, 148. A correspondence in which the parties call each other husband and wife will suffice. *Leslie* 22 D. B. M. 993. But a vague expression, such as calling her "Mrs. A," is not enough without other circumstances. *Aitchison*, 1 D. B. M. 42. Though the consent cannot be given by will, yet it may be acknowledged by a writing kept secret till the death of the party. *Hamilton*, 9 Cl. & F. 327. If the parties executed a written acknowledgment, its effect may be rebutted by evidence that it was made for some collateral purpose; but one party will not be allowed to set up his own fraud in this respect. *Fleming* v. *Corbet*, 31 Sc. Jur. 562. The time and place of the marriage need not be proved. *Leslie*, 32 Sc. Jur. 423. But if the evidence does not fix the consent as having been exchanged in Scotland, it will not suffice. *Yelverton* v. *Longworth*, 36 Sc. Jur. 716.

promise, either marriage or any evidence of marriage; and no court has power to declare it a good marriage.[1]

861. *Cohabitation as man and wife.*—Nor are mere cohabitation and reputation as man and wife, however long and undisguised, either marriage or any ground for a court declaring a marriage between the parties so cohabiting. Nor are these even evidence of marriage,[2] where the fact of marriage requires to be strictly proved, as, for example, in indictments for bigamy, or petitions for damages against

IN SCOTLAND.

[1] *Contra;* a promise of marriage, followed by *copula* on the faith of such promise, constitutes marriage, or at least is a good ground of action for declaring a marriage. The promise must be mutual. *Campbell* v. *Honeyman*, 5 W. S. 92. It must also be a promise unconditional, and not revoked before *copula*. *Stewart* v. *Menzies*, 2 Rob. Ap. 547. Where there is a promise, then a revocation, and then *copula*, it seems the original promise is revived. *Hoggan* v. *Craigie*, M'L. & Rob. 942. But the promise can only be proved by some writing, as a letter of the party, or by reference to oath, *i.e.* by staking the truth on his oath. *Campbell* v. *Honeyman*, 5 W. S. 92; *Monteith* v. *Robb*, 5th March 1844; *Mackenzie* v. *Stewart*, 10 D. B. M. 611; *Lowrie* v. *Mercer*, 28th May 1840. Where the promise is in writing, however clear, it may be disproved by parole evidence that the writing was made for some other purpose than marriage. *Stewart* v. *Menzies*, 2 Rob. Ap. 547. And sometimes the court will permit the defender to be judicially examined, the effect of which is, that if the party do not appear to be examined, he will be held as confessed. 1 Fraser, P. R. 700. But the *copula* may be proved by parole evidence. *Reid* v. *Lang*, 1 Sh. Ap. 440. It is not clearly settled whether the promise *cum copula subsequente* amounts to marriage, or is merely ground for a suit to declare marriage. 1 Fraser, D. R. 164. It seems the children are bastards until a decree of the Court, or a regular marriage follow; and if one of the parties die, no action can be raised. *Ibid*, 177, *et seq.*

[2] *Contra;* cohabitation and habit and repute are good evidence of the fact of marriage, as implying a previous consent. There must be cohabitation, as well as repute, and neither will do without the other. Ersk. 1, 6, 6; Hamilton, 22d November 1839, F. C.; Cunningham, 2 Dow, 482; *Lang* v. *Lang*, 3d June 1841. The parties must, during the cohabitation, mean and intend marriage, and be free from any impediment to marry. *Lapsley* v. *Grierson*, 8 D. B. M. 34. Where the cohabitation has begun in concubinage, it requires evidence of a very marked change to convert it into marriage. *Cunningham*, 2 Dow, 482; *Lang* v. *Lang*, 8th June 1841. But it is not quite clear whether cohabitation and habit repute constitute a marriage to all intents and purposes, unless a decree of the Court has been obtained. See 1 Fraser, P. R. 166; *Pennycook* v. *Grinton*, M. 12,677; *Hamilton* v. *Hamilton*, 22d Nov. 1839, F. C.

an adulterer.[a] In actions, however, on other grounds, where marriage is not directly in question, and is rather a collateral matter not requiring strict proof, evidence of cohabitation, and of general reputation as man and wife, may be received to prove marriage.[b]

862. *Banns, license, and notice preceding marriage.*—The kind of previous public notice required may be by publication of banns on three successive Sundays in the parish church or a parish chapel during divine service;[1] but a marriage license obtained from the ordinary of the district, or a special license from the archbishop, will dispense with banns. And as to marriage elsewhere, notice for a similar length of time must be given to the registrar of the district, and recorded in his book; or he may grant a license for marriage to dispense with the longer notice.[c] Where a marriage has been unduly solemnized under the statutes, with the knowledge of both parties, such marriage is void;[d] and it is perjury to make and sign a false declaration on giving the notice to the registrar or officer.[e]

Where one of the parties resides in Scotland, and intends marriage under the Act 6 & 7 W. IV. c. 85, a certificate by the Session-clerk in Scotland of due proclamation of banns there, is equivalent to a certificate by an English district registrar.[f]

863. *Where marriage must be celebrated.*—The marriage ceremony

[a] *Catherwood* v. *Caslon*, 13 M. & W. 261.
[b] *Doe* v. *Fleming*, 4 Bing. 266; *Smith* v. *Smith*, 1 Phillim. 294; *Kay* v. *Duchesse de Vienne*, 3 Camp. 123; *Goodman* v. *Goodman*, 33 L. T. 70.
[c] 6 & 7 W. IV. c. 85.
[d] *Ibid*, § 42; 4 Geo. IV. c. 76, § 22; *Campbell* v. *Corley*, 28 L. T. 109.
[e] 19 & 20 Vic. c. 119, § 2.
[f] *Ibid*, § 8.

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[1] So, in regular marriages, which are all but universal in practice, proclamation of banns in the parish church is necessary, after which either a minister of the Established Church or a dissenting minister performs the ceremony, there being no particular form required. 4 & 5 W. IV. c. 28.

If the marriage is not celebrated in the regular way, *i. e.*, after due proclamation of banns, and by a clergyman, it is called a *clandestine* marriage, and certain penalties attach to persons who celebrate the marriage, *i. e.*, perform or conduct the ceremony. Stat. 1661, c. 34; 1698, c. 6; 4 & 5 W. IV. c. 28; *Jolly* v. *M'Gregor*, 3 W. S. 85. The penalties seem also to attach to the parties and witnesses, and these were often supposed to be evaded by the parties appearing before a justice of the peace, and re-exchanging their consent. The penalties are seldom sued for; yet it is still an indictable offence, and the public prosecutor may prosecute. *Lord Advocate* v. *Ballantyne*, 31 Sc. Jur. 386. But no conviction can take place without

must take place in a church, or licensed chapel, and most dissenting chapels are licensed for this purpose; or in the registrar's office or registered building; and where a clergyman of the Established Church does not perform the ceremony, the registrar must be present and two witnesses. There must be open doors in all cases. The marriage cannot take place in a private house, unless by special license from the Archbishop (an expensive proceeding), and it is felony to celebrate it there.[a] [1]

Ceremony of Marriage.—If the marriage takes place in a church or chapel of the Church of England, the service must be in conformity with the rubric prefixed to the office of matrimony in the Book of Common Prayer.[2] But where the parties contract marriage in a registrar's office, no religious ceremony can be used beyond the exchange of consent required for the civil contract.[b] If, however, the marriage takes place in a registered dissenting chapel, there may be superadded to the civil contract whatever religious ceremony the clergyman or minister of such church or persuasion is authorised by his church to use.[c]

864. *At what hour.*—The marriage must be celebrated in canonical hours, *i.e.* between 8 and 12 in the forenoon, unless it is by special license, which dispenses with such hours.[3]

865. *Residence of parties.*—One of the parties must have previously resided in the place where the notice of marriage is given

[a] 26 Geo. II. c. 33; 4 Geo. IV. c. 76, § 21.
[b] 19 & 20 Vic. c. 119, § 12. [c] 19 & 20 Vic. c. 119, § 12.

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proof that one of the parties had resided in Scotland, either usually, or twenty-one days next preceding the marriage. 19 & 20 Vic. c. 96, § 3.

[1] *Contra;* it is legal in all cases, and usual, except where the parties are members of the Episcopal Church in Scotland, to be married in a private house.

[2] *Contra;* if the marriage takes place in the Established Church, or be celebrated by a minister of such church, no particular form of service is necessary. Each dissenting church prescribes its own rules; but members of the Episcopal Church in Scotland follow the directions of the Book of Common Prayer.

[3] *Contra;* the marriage may be celebrated at any hour of the day or night.

or the license is obtained, seven or fifteen days respectively.[a] [1] But after marriage that matter is not allowed to be opened up.[b]

Wife's name after marriage.—When a woman marries, her maiden surname is sunk in that of her husband; and Mary Jones, on marrying John Smith, is properly named thereafter "Mary Smith." [2] Yet it is an inveterate practice of women, immediately after marriage, to sign their maiden names in the marriage register.

866. *Infant marrying.*—Though an infant, if male above fourteen, and if female above twelve, may marry, yet the consent of the parent or guardian is for some purposes necessary;[c] [3] that is to say, if one of the parties, on applying for license, or banns, etc., fraudulently represent to the registrar or other officer that such consent had been obtained, he or she forfeits all benefit arising from the property of the infant, which will be settled upon the innocent party, or if both parties acted fraudulently, then upon the issue.[d]

867. *Divorced party marrying adulterer.*—Where a marriage has been dissolved between A and B, on the ground of B's adultery with C, it is lawful thereafter for B to marry C.[e] [4] But no clergyman of

[a] 4 Geo. IV. c. 76, § 10; 19 & 20 Vic. c. 119.

[b] 4 Geo. IV. c. 76, § 26; 6 & 7 W. IV. c. 85, § 25.

[c] 4 Geo. IV. c. 76, § 16; 6 & 7 W. IV. c. 85.

[d] 4 Geo. IV. c. 76, § 23; 6 & 7 W. IV. c. 85, § 43; 19 & 20 Vic. c. 119, § 19.

[e] 20 & 21 Vic. c. 85, § 57.

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[1] One of the parties must either have usually resided in Scotland, or at least must have resided there for the period of twenty-one days next preceding the marriage, since 1856, by 19 & 20 Vic. c. 96, § 1. This statute was passed to discourage Gretna Green marriages. And if the parties, within three months after an irregular marriage, go before the sheriff, and prove such residence, his certificate and warrant to the registrar will be conclusive. *Ibid*, § 2.

[2] *Contra;* a married woman's name is an *alias*, and she would be correctly named and described as "Mary Jones or Smith." Yet the courts have held the error of describing her as Mary Smith of no consequence, where the husband's name is correctly given. *Muir* v. *Hood*, 10th July 1845.

[3] *Contra;* the consent of parent or curator is unnecessary, and the want of it does not make the marriage clandestine. Bell's Pr. § 1523; Ersk. 1, 6, 2. And no forfeiture is caused by the misrepresentation of the consent of such parent or curator.

[4] *Contra;* the two parties committing the adultery cannot marry, where the divorce was pronounced by a Scotch court. Stat. 1600, c. 20; Bell's Pr. § 1526. Yet the children of such a marriage, though incapable of suc-

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882. *Marriage revokes will.*—The marriage of a man or woman impliedly revokes any will he or she may have previously made,[1] unless it was made under a power of appointment, and the property would otherwise not go to the heir or next of kin.[a]

883. *Wife's chattels in possession.*—On marriage, the husband's personal estate continues exclusively his own, and the wife's personal estate, so far as it consists of specific chattels in possession, becomes absolutely his. He can do what he pleases with both, and he can by will bequeath the whole to any person he pleases, whether the wife survives him or not;[2] and if he die before the wife intestate, such chattels will go to his widow and next of kin, according to the Statute of Distributions.

884. *Wife's chattels real.*—The wife's chattels real, such as leases and mortgages, become so far the absolute property of the husband, that he can sell[3] or dispose of them during his life, though if he die before her, they will not pass by his will.[b] If he survive her,

[a] 1 Vic. c. 26, § 18; see *ante*, § 677. [b] *Milford* v. *Milford*, 9 Ves. 87.

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[1] *Contra;* marriage of itself is no revocation of a testament or disposition *mortis causa*, but it may restrict their effect; and the birth of a child will operate a revocation to some extent, for there is an implied condition to that effect. See *ante*, § 676, 677 *n n.*

[2] *Contra;* the wife's goods, together with those of the husband, form a common fund called *communio bonorum;* Bell's Pr. § 1547, *et seq.* The husband is practically the absolute master of the fund during his life, and can squander it at will; but he cannot on deathbed or by any revocable deed gratuitously alienate the fund with the fraudulent intent to defeat the rights of the widow and children. Moreover, the husband can only bequeath to strangers one-half of the goods in communion, if the wife survive and there is no child, or if children survive and there is no wife, and one-third, if both wife and children survive; that is to say, his will has no operation on more than the dead's part, *i.e.*, which is a half or a third respectively. See *ante*, § 737, 738 *n n.*

[3] *Contra;* as the wife's heritable securities, such as bonds and dispositions in security and her leases, are heritable and not moveable property, he has only a liferent interest in these, and he cannot sell or bequeath them. Bell's Pr. § 1593. Nor do they become his if he survive her; they go to her heir-at-law.

however, they become absolutely his; if she survive him, they remain hers, so far as he has not during life disposed of them.

885. *Wife's choses in action.*—The wife's choses in action, *i.e.*, her right to sue on any contract or deed, as for money lent, on bills of exchange, on bonds, legacies, reversionary interests, etc., become so far the property of the husband, that he can, by reducing these into possession,[1] as by receiving or recovering them at law, make them his own, but he cannot bequeath them by will, and they revest in the widow if she survive.[2] He may, in general, sell his interest in them; but in some cases neither he nor his wife together could, until 1857, sell or mortgage her future reversionary interest in personal estate. And this can still only be done by deed in which the husband concurs, and which is separately acknowledged, the property having been given to the wife by some instrument made since 1857.[a]

Wife's power to sue.—A wife cannot sue in a court of law without her husband being joined with her. In many cases her husband can sue without her for debts due to her; but she must be joined in suing on contracts made with her *dum sola*, and also in respect of torts to her person.[3] The wife can, however, sue as a *feme sole* when judicially

[a] 20 & 21 Vic. c. 57.

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[1] *Contra;* debts due to the wife fall under the *communio bonorum*, whether reduced into possession or not, and therefore belong to the husband, so far that he can alienate them during life, and his will will operate on the dead's part thereof, subject to qualifications stated *ante*, § 883; 1 Fraser, D. R. 357. The test of whether the wife's rights of property fall under the *jus mariti*, and so become goods in communion, is not whether an action requires to be raised for their recovery, but whether they are heritable or moveable, the general rule being that all the moveable property of the wife, except personal bonds bearing interest, belongs to the husband *jure mariti*, or, as it is said, the marriage is an assignation of such rights to him. Ersk. 1, 6, 12; More's Stair, notes 146.

[2] *Contra;* the husband can by will bequeath the debts due to the wife to a certain extent. See last note.

[3] The wife can in general sue only with the concurrence of the husband, but if she is in business and living separate, she can sue for a *quasi delict* (tort) committed against herself. *Ewings* v. *Mackenzie*, 6 W. S. 101. Yet the husband has been held entitled to sue alone for legitim due to the wife. *Mackenzie* v. *Wilson*, 31 Sc. Jur. 326. Moreover, in all cases where the husband's *jus mariti* and right of administration have been excluded by deed in reference to any part of her property, she can sue alone in respect to such property, and the court will appoint for her a curator *ad litem*.

separated, and she can, in many cases, sue in the Court of Chancery by a *prochein ami.*

886. *Wife's real estate.*—The wife's real estate continues vested in her alone, subject to the husband's dominion or life estate therein; and though he can sell such life estate, he cannot sell the fee.[1] The wife can neither sell nor mortgage her real estate, without the husband's concurrence, unless he is a lunatic, transported beyond the seas, or living apart from her; and to guard against the marital control she must separately acknowledge[2] before a judge or commissioners her free consent to the execution of such deeds.[a]

887. *Acknowledgment of deeds by married women.*—This acknowledgment of deeds affecting her real estate takes place before two special or perpetual commissioners (who are generally solicitors appointed for such purposes by the chief of the Court of Common Pleas), or before a judge of one of the superior courts, in the following manner:—The wife appears and is examined apart by the commissioners, who ascertain from herself whether she freely and voluntarily consents to the deed. They then make out a certificate to that effect, and at the same time indorse a memorandum on the deed so acknowledged.[b] Where the married woman is a tenant in tail, the concurrence of the husband is necessary, and the disentailing deed must also be acknowledged as above.[c] Without such acknowledgment the deed is, in general, absolutely void at law; and also in equity, except it relate to her separate estate.[d][3]

[a] 3 & 4 W. IV. c. 74, § 79, *et seq.*
[b] *Ibid*, c. 74; 17 & 18 Vic. c. 75.
[c] *Ibid*, c. 74, § 40.
[d] 3 & 4 W. IV. c. 74, § 40; 4 Cruise, 32, 2, 29; 2 Bl. Com. 292; Burt. Comp. § 206.

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[1] The same.

[2] The same as regards judicial ratification of the wife's deeds. Stat. 1481, c. 83; Bell's Pr. § 1615. See next note.

[3] *Contra;* the judicial ratification of deeds by married women may take place before any justice of the peace, though out of his jurisdiction, at his private residence. Ersk. 1, 6, 33. The wife is attended by two witnesses, and the ratification is generally indorsed on the back of the deed, and signed by these witnesses. The only evidence of the ratification is the wife's signature; or if she cannot write, two notaries must attest the fact. The want of the ratification does not, however, make the deed null, but reducible only, on the wife proving that she acted under force or fear of the husband. It prevents her from afterwards setting up the objection of force or fear (duress), but not other objections, as fraud, deathbed, etc. Ersk. 1, 6, 35; *Buchan* v. *Risk*, 12 S. D. 511; *Brisbane* 12 D. B. M. 917.

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888. *Wife's powers before marriage.*—The wife can, before marriage, alienate or settle all her personal and real estate to her separate use; but if this is done any time after the negotiation for the marriage, and without the knowledge of the intended husband, it may be set aside by him as a fraud on the marital right.[a] Hence the husband ought always to be a party to such settlements.[1]

889. *Husband's liability for wife's debts.*—When a wife during marriage contracts debts which are not necessaries and not binding on the husband, these may nevertheless sometimes be binding on her separate estate.[b] But in general the husband is liable for all her debts contracted before marriage. The husband and wife must be sued jointly[2] for all debts due by the wife before marriage, and execution may be had against the wife personally as well as the husband; but if the wife is taken in execution and imprisoned, she is entitled to apply to a judge for her discharge, if she can show that she has no separate estate.[c] But if the wife is judicially separated, the husband is in general no longer liable for her debts.[d 3]

890. *Wife's earnings.*—Though the earnings of the wife belong to the husband, yet, after the husband deserts her, she may obtain an order to protect all property acquired after such desertion.[e 3] So after she is judicially separated from her husband, her earnings become her own absolute property.[f 3]

891. *Husband's liability to maintain wife.*—A husband is not bound at common law to maintain his wife, though he is indirectly

[a] *Strathmore* v. *Bowes*, 2 Bro. C. C. 345.
[b] See *post*, § 899.
[c] *Newton* v. *Rowe*, 7 M. & Gr. 329; *Newton* v. *Boodle*, 4 C. B. 359; 9 C. B. 948.
[d] See *ante*, § 880.
[e] 19 & 20 Vic. c. 85, § 21; 21 & 22 Vic. c. 108, § 6, 7, 8.
[f] 19 & 20 Vic. c. 85, § 25.

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[1] The same. Bell's Pr. § 1551. After proclamation of banns or betrothment, all gratuitous deeds of alienation, discharges of debt, etc., by the woman, tending to diminish the fund falling under the *jus mariti*, are void. 1 Fraser, D. R. 347.

[2] *Contra*; the husband must also be cited, and is liable jointly to pay the wife's debts; but if she has separate moveable estate from which the *jus mariti* is excluded, it must be first poinded; or if she has heritable estate, it must first be adjudged before the husband can be called on to pay. Ersk. 1, 6, 17; 1 Fraser, Pers. Rel. 297. The wife herself is not personally liable, though after her husband's death her liability will revive. M. 5982.

[3] The law is now the same since 1861. 24 & 25 Vic. c. 86, §§ 1-4.

liable; for if he does not maintain her, persons who supply her with necessaries can, in general, recover against him.[1] But by the Vagrant Acts, if he run away and desert her, the churchwardens may sell his goods, etc., in order to support her; and if he wilfully refuse to maintain or desert her, he is liable to be convicted as an idle and disorderly person, or a rogue and vagabond, and may be imprisoned for one or three months.[a2] The wife cannot sue the husband directly for alimony,[3] except as incidental to a suit for judicial separation or divorce.

892. *Wife's equity to a settlement out of a legacy, etc.*—As a husband is not bound at common law to maintain his wife (except in so far as he is liable on her contracts for necessaries), an equitable doctrine exists to compensate her in some degree for this disadvantage. Wherever the husband would be obliged to resort to a court of equity to obtain the benefit of any of his wife's property, as to recover a legacy left to her, if he has made no other provision for her, the court will order part of such property, if exceeding in value £200, and even, it seems, irrespective of that amount, to be settled upon the wife and her children, to her separate use. This is called the wife's equity to a settlement.[b4]

But so long as the husband is willing to live with and maintain his wife, a court of equity will not ordinarily take from him the

[a] 5 Geo. I. c. 8; 5 Geo. IV. c. 83, §§ 3, 4.

[b] *Sturgis* v. *Champneys*, 5 My. & Cr. 103; *Re* Cutler, 14 Beav. 220; *Squires* v. *Ashford*, 23 Beav. 599; *Re* Kincaid, 1 Drewr. 326; *Francis* v. *Booking*, 19 Beav. 347.

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[1] *Contra;* the husband is bound at common law to aliment the wife whether she raises a suit for judicial separation or for adultery, or whether she does not. But as he is only bound to support her, while she lives in his house, the action is chiefly brought in cases of desertion, etc. If she has separate property, she must contribute to their expenses. 1 Fraser, 429. And though she is a creditor as against him for aliment, she is postponed to the husband's creditors, for the debts are the first burden on the common stock. Ersk. 1, 6, 19; Stair, 1, 4, 10. The action of aliment may be brought in the Sheriff Court or Court of Session. 1 W. IV. c. 69, § 32.

[2] The Poor Law Act also makes him liable, under pain of imprisonment, to support his wife.

[3] *Contra;* she can raise an action of aliment irrespective of any proceeding for divorce. Bell's Pr. § 1538; see *ante*, note 1.

[4] The same, or nearly so, since 1861. 24 & 25 Vic. c. 86, § 16. The court will decide what is a reasonable provision. But at common law the husband is bound to maintain the wife.

income and interest of her fortune, though it may secure the fund so as to give her the chance of taking it by survivorship.[a] The wife's equity prevails against the assignees on bankruptcy of her husband, and even, it seems, against the specific assignee or purchaser from the husband for valuable consideration of her choses in action and equitable interests.[b]

When the court orders a settlement, the limitation is in general such as to secure the interest of the wife and her children, but seldom so as to give her next of kin or legatees, etc., the property in the event of her predeceasing her husband.[c] The wife may waive the above equity by consenting in open court to the husband taking the property absolutely, or it may be waived by her misconduct unless she is a ward of court.[d] Though the court in settling the fund generally takes care of the children also, yet these have no independent equity of their own to call for a settlement.[e]

Formerly, if the married parties were domiciled in Scotland, the court would pay the whole legacy to the husband.[f][1]

893. *Wife's maintenance out of her own property.*—Though a court of equity has no power to decree a suitable maintenance for the wife out of the husband's property, yet if she has equitable property of her own within the reach of the court, and the husband has deserted or ill-treated or refused to maintain her, the court will direct a suitable maintenance out of such property; or if it has been sold without notice to a *bona fide* purchaser, then out of other property of the husband.[g][2]

[a] Story, Eq. Jur. § 1411; 2 Spence, 476.
[b] Story, § 1412, 1426; *Scott* v. *Spashett*, 3 Mac. & G. 605.
[c] *Carter* v. *Taggert*, 1 De G. M. & G. 286.
[d] Story, Eq. Jur. § 1412.
[e] *Ibid.*
[f] *Anstruther* v. *Adair*, 2 My. & K. 513; *Brcadalbane M.* v. *Chandos M.*, 2 My. & Cr. 738; *M'Cormick* v. *Garnett*, 5 De G. M. & G. 278; *Hitchcock* v. *Glendinnan*, 12 Beav. 534.
[g] Story, Eq. Jur. §§ 1408, 1422; *Todd* v. *Lister*, 10 Hare, 151; 3 De G. M. & G. 857.

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[1] See note 4, *ante*, p. 297. Formerly if the parties were domiciled in England, the wife might have applied to the Scotch court to make provision to her out of funds coming to her there. *Buckingham* v. *Winterbottom*, 23 Sc. Jur. 532.

[2] *Contra*; a wife is entitled to aliment from her husband, and there is no distinction between courts of law and equity. If the wife has heritable

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894. *Wife's will.*—A wife cannot make a will of real estate being excepted out of the stat. 34 & 35 Hen. VIII. c. 5,[a] [1] but she has often a power of appointment given to her enabling her to do so.

895. Nor can a wife execute a will of personal estate, without her husband's consent, unless she is judicially separated.[2]

896. But with his consent she can make a will of her personal estate, provided such assent is given, not in a general sense, but as applicable specially to the particular will; yet the husband can revoke this consent any time before probate.[b] After her husband's death, however, she may recognize a will made by her during coverture, and thereby cause it to operate as a new will.[c]

897. A wife can always make a will of her separate personal estate, without her husband's consent,[3] but her separate real estate must in general be disposed of by deed executed during life.

898. *Limits of wife's power to bind husband for necessaries.*—Though a wife cannot in general contract during coverture so as to bind her husband, she has an implied authority to do so for necessaries, if not otherwise provided. And this power she has equally, though she is turned out of doors, provided the husband was not justified by her misconduct in doing so. There is no process of law by which a husband can revoke his wife's implied authority to bind him for necessaries, so that a tradesman *bona fide* supplying her will thereafter be disentitled to recover. But he can always by a

[a] 1 Vic. c. 26, § 8. [b] Wms. Exec. 45.
[c] *Ibid; Exp. Fane*, 16 Sim. 406.

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property, the rents of which belong to her husband, she cannot insist on a portion of these being set apart for her aliment as against the husband's creditors. *Buchanan* v. *Ferrier*, 1 S. D. 299; 2 Bell's Ill. 274.

[1] *Contra;* a will does not pass heritable estate, but she can execute a disposition of her heritage, *mortis causa*, which has a similar effect to a will, without the husband's consent. Ersk. 1, 6, 28; More's Stair, notes 18; but see Bankt. 1, 5, 67.

[2] *Contra;* she can execute a testament without the husband's consent of her moveable property. Ersk. 1, 6, 28; see much learning on this subject in *Miller* v. *Angus*, 31 Sc. Jur. 209, also *Leighton* v. *Russell*, 25 Sc. Jur. 63; but there is no part of the goods in communion on which it can operate since 1855. 18 Vic. c. 22, § 6.

[3] The same.

special notice to a particular tradesman effect this end when his wife is living in family, or if not, when she is otherwise provided.[1]

899. *Process against wife.*—As a wife has no power to contract during the marriage, except where she is trading as a feme sole in the city of London, so she cannot be sued on contracts which she professed to make during coverture. But there is an exception where the husband is civilly dead; also, where she is judicially separated,[2] and the contract was made after the separation.[a]

900. *How far she binds her separate estate.*—But where the wife made the contract in respect of her separate property, the creditor can procure payment out of this property, not by any action or execution at law, but by proceedings in a court of equity, though in that court her person cannot be taken in execution.[b 3] Yet after the

[a] 20 & 21 Vic. c. 85, § 25; 21 & 22 Vic. c. 108, § 8.

[b] Story, Eq. Jur. § 1397, 2 Spence, 324; *Vaughan* v. *Vanderstegan*, 2 Drew. 179; *Murray* v. *Barlee*, 3 My. & K. 210; *Owens* v. *Dickenson*, Cr. & Ph. 48.

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[1] *Contra;* a tradesman's right to recover for necessaries supplied to the wife, may be excluded without any special notice, by a process of *inhibition.* Ersk. 1, 6, 26. This consists of executing (*i. e.*, serving upon her) the inhibition, which is a writ in the Queen's name addressed to all and sundry by a messenger-at-arms, then publishing it at the head burgh of the county, and registering the same in the county register of Inhibitions, or in the General Register of Inhibitions at Edinburgh within forty days. This is held notice to all the world who may deal with her. Yet the husband must still aliment her. And he may depart from the inhibition (*i. e.*, waive it), though that fact can only be proved by his writ or oath. M. 6023.

The effect of inhibition is to destroy the presumption of the wife's *præpositura*, and to put all the public who deal with her *in mala fide.* M. 6017. No special notice need be given even to those tradesmen who were accustomed to supply her. *Topham* v. *Marshall.* M. App. Inhib. No. 1. Yet if special notice should be given, it will have the same effect as inhibition. Inhibition is equally valid, though the wife continues to live with the husband; it is, however, easier in that case to imply the husband's assent.

[2] *Contra;* the wife's protection as regards her person equally continues, though there is a judicial separation. 1 Fraser, D. R. 263.

[3] The same diligence may proceed against the wife's separate estate, but not against her person, where the money was *in rem versum.* *Gray* v. *Wylie*, 26th June 1840. *Gifford* v. *Rannie*, 25 Sc. Jur. 268. Bell's Pr. § 1612. So as to obligations *ad facta præstanda.* Ersk. 1, 6, 19.

husband's death she may be liable to ordinary process, in respect of the contract as to her separate estate.[a]

If she give a bill or bond to pay her own debt, or if she join with her husband in a bill or bond to pay his debt, without reference to her separate estate, this will be taken, nevertheless, to be an application, *pro tanto*, of her separate estate. But if she give no security, and the debt be one of an ordinary description, it seems, as the husband is alone bound, the debt will not be binding on the separate estate.

901. *Gifts and contracts between husband and wife.*—Contracts made between husband and wife during marriage are a mere nullity at law; but if they are reasonable they will sometimes be enforced in a court of equity. Thus a contract of the husband for good reasons that the wife should possess as separate estate property bequeathed to her will be enforced.[b] So gifts by the husband to the wife to purchase clothes and ornaments, and gifts of her earnings or savings to be held to her separate use will be held good against the husband's creditors.[c] A wife having separate estate may validly make a gift of it to the husband, and the gift is not revocable though the fund exists unapplied.[d] [1]

RIGHTS OF THE MARRIED PARTIES ON DISSOLUTION OF THE MARRIAGE.

902. *Rights of wife on death of husband.*—It makes no difference as to the rights of the survivor that the marriage was dissolved

[a] *Stead* v. *Nelson*, 2 Beav. 363.
[b] Story Eq. Jur. § 1372, *Anderson* v. *Abbott*; 23 Beav. 457.
[c] Story, Jur. § 1374.
[d] *Caton* v. *Ridout*, 1 Mac. & G. 603.

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[1] *Contra*; the husband and wife may competently enter into contracts with each other; but they are revocable so far as they are gratuitous. And the law presumes a donation in such cases. Onerous contracts are effectual as between strangers, but those which are substantially gratuitous may be revoked any time during the life of the giver, though the other party has died, unless a third party's interests are involved. The revocation of a *donatio inter virum et uxorem* may be by express deed, or may be implied from deeds inconsistent therewith. It is barred by a divorce on the ground of adultery. Bell's Pr. § 1616. Ersk. 1, 6, 29, *et seq.* *Ferne* v. *Colquhoun*, 27 Sc. Jur. 86.

within a year.[1] The husband has power to bequeath all his personal estate[2] (including what he acquired through his wife, unless it was settled to her separate use) to any person he chooses other than his wife and children; but he cannot bequeath his wife's choses in action (which he had not in his lifetime reduced into possession), nor her chattels real, nor her paraphernalia, so that these become absolutely hers by survivorship.[a]

903. The widow is generally preferred, and, at least, is entitled, along with the next of kin,[3] to be the administratrix of the husband in the event of his dying intestate.

904. *Paraphernalia.* — The widow is entitled, as against her husband's will, to her paraphernalia, *i.e.*, such articles of personal apparel and adornment, suitable to her rank in life, as she continued to use during the marriage.

905. The husband, however, can, in his lifetime, if the chattels were bestowed on the wife by himself, pawn or sell, or give away the paraphernalia,[b] [4] and they can be taken in execution, except so far as they consist of necessary clothing, by his creditors. Moreover, where there is a deficiency of assets to pay debts,[5] all the paraphernalia,

[a] See also *post*, § 912.

[b] 2 Bl. Com. 436; Noy's Max. c. 49; *Graham* v. *Londonderry*, 3 Atk. 393.

IN SCOTLAND.

[1] The same since 1855, by 18 Vic. c. 28, § 6. Formerly if the marriage was dissolved within year and day without a living child, the parties were restored as nearly as possible to their former situation. The tocher was returned, etc.

[2] *Contra;* the widow cannot be deprived by her husband's will of one-third or one-half of the goods in communion, in the event of there being children, or no children, respectively, that being her *jus relictæ*, though her husband during life may squander away the fund from which it comes. See *ante*, § 673 *n.*

[3] *Contra;* the widow is postponed to the next of kin in the right to be her husband's executor-dative. See *ante*, § 732 *n.*

[4] *Contra;* the paraphernalia of a married woman includes not only ordinary articles of dress as well as personal ornaments, but also a chest of drawers. M. 5824. Articles given by relations to a woman on her marriage, such as table linen, work tables, etc., are, however, not included in paraphernalia. 2 Bell's Ill. 267. The husband can neither pawn nor pledge, nor give away the paraphernalia, nor can his creditors attach them. Ersk. 1, 6, 15. M. 6044. *Binny* v. *Smith*, 14 S. D. 355.

[5] *Contra;* the paraphernalia cannot be taken to pay the husband's debts after his death. Ersk. 1, 6, 8; 1 Fraser, D. R. 400.

except the clothing, may be taken by the creditors, subject to the widow's right to have the assets marshalled in her favour.[a] But the widow's claim is preferred to that of legatees and devisees.

There is an exception where the paraphernal goods were given, not by the husband but by a stranger, before or during marriage, for then they are presumed to have been so given to the separate use, and the husband and his creditors cannot take them.[b]

906. *Pin-money.*—Pin-money is not an absolute gift to the wife, but rather a gift on condition that she will expend the money in attiring her person in a manner befitting her husband's rank. Hence she cannot alienate it to third parties, and if she fail to draw the arrears, a court of equity will not enforce payment of more than one year's arrears, and if it has not been paid to her when alive, her representatives cannot claim arrears.[c] [1]

907. *Dower of wife.*—Dower, which is the widow's life-estate in one-third of the husband's real estate, is claimable by the widow in general out of all kinds of real estate, corporeal and incorporeal.[2] There is no exception of the mansion house[3] on the family estate. The widow (if married since 1834) may claim dower out of the husband's equitable estate, or estates of which the legal title is in a trustee.[d] [4] Dower is claimable though the husband died within a year after the marriage.[5] So dower is claimable (if the marriage

[a] *Snelson* v. *Corbet*, 3 Atk. 369.
[b] *Ridout* v. *E. Plymouth*, 2 Atk. 104; Story's Eq. Jur. 1376; 2 Bl. Com. 436; 11 Jurm. and Byth. by Sweet, 442.
[c] Story's Eq. Jur. § 1375; 2 Spence, 500.
[d] 3 & 4 W. IV. c. 105, § 2.

IN SCOTLAND.

[1] The word pin-money is also frequently used in modern marriage contracts. It seems to be treated as *prima facie* an alimentary provision that is not assignable to third parties.

[2] *Contra;* the wife has in general terce out of all heritable subjects and rights in which the husband was infeft, but she has no terce out of some kinds of heritable property, as superiorities, feu-duties, leases, patronage, and some subjects held burgage. Bell's Pr. § 1598.

[3] *Contra;* it seems that the mansion-house and garden are not included in the subjects liable to terce, unless they are let, or there are more than one. *Mead* v. *Swinton*, M. 15,873.

[4] So the widow has terce out of estates held in trust for the husband's behoof. *Bartlett* v. *Buchanan*, 21 Feb. 1811, F. C. But see More's Stair, notes, 219.

[5] The same since 1855. 18 Vic. c. 23, § 7.

took place since 1834), though the husband was not actually seised, provided he was entitled to be so.[a 1] The widow is entitled to dower in a moiety, and sometimes in the whole of the lands held in gavelkind, but her dower in copyhold estate, called her free bench, depends entirely on custom.[b]

908. *Dower, how barred.*—Where the marriage has taken place since 1834, no dower is claimable out of an estate which the husband has absolutely disposed of in his lifetime,[2] or by will.[c 3]

909. The husband, if married since 1834, can, by an express declaration in his will, defeat the claim to dower;[d 4] but a bequest of personal estate does not, unless expressly so stated, bar her dower.[e] If the husband devises by will the real estate, or any life interest therein to the widow, this will bar her dower, unless the will state the contrary.[f]

910. Divorce obtained on the ground of the wife's adultery bars dower;[5] and if she has eloped, and is living in adultery, this will be a bar, if there had been no subsequent reconcilement.[g 6]

[a] 3 & 4 W. IV. c. 105, § 4.
[b] Burt. Comp. § 341, 1311.
[c] 3 & 4 W. IV. c. 105, § 4.
[d] *Ibid*, § 7.
[e] 3 & 4 W. IV. c. 105, § 10.
[f] *Ibid*, § 9.
[g] 2 Inst. 436; 12 Mod. 232.

IN SCOTLAND.

[1] *Contra;* to entitle the wife to her terce, the husband must have been actually infeft in the lands. Hence if a purchaser has bought and possessed the land, but never taken infeftment, the wife's terce will be preferred to his personal right. M. 15,866; 15,874; Ersk. 2, 9, 46.

[2] The same, if the purchaser has been actually infeft. Ersk. 2, 9, 46; see *ante*, § 907 *n.*

[3] *Contra;* there being no alienation by will of heritable estate, the husband cannot by his will, or by a disposition *mortis causa*, reserving his own liferent (which often in many respects operates like a will), defeat the widow's terce; and though he can do so by conveying to and infefting his eldest son or heir-at-law, yet the widow has an action against the husband's representatives. Ersk. 2, 9, 46, 48; 1 Fraser, D. R. 241. But a deed in favour of the husband by a third party, may be qualified by a clause excluding the terce.

[4] *Contra;* see last note.

[5] So a decree of divorce, grounded on the wife's adultery, or wilful desertion, of itself excludes the widow's terce. *Clement* v. *Sinclair*, M. 337; Balf. 112, No. 124. But nothing short of a divorce actually obtained will exclude it. See Ersk. 2, 9, 51.

[6] *Contra;* Ersk. 2, 9, 51; See last note.

Rights of the Married Parties on Dissolution of the Marriage.

911. *Assigning dower.*—The mode in which the widow establishes her right to dower is by an action of dower *unde nihil habet*, or an action of right of dower, in which the court assigns her her dower. She may also proceed by a bill in Chancery.[1] She has merely a claim, but no estate, until the assignment.

912. *Widow's claim for maintenance from executor.*—The widow has no claim upon her husband's executor or administrator for temporary maintenance till the time when any legacy left to her or her share under the Statute of Distributions becomes payable,[2] except only that, where she can claim dower, she has a right to remain forty days in the house at the expense of the executor. This right is called her quarantine.[a]

Nor is she entitled, however destitute, to any maintenance from her husband's executor, or heir, or devisee, as such, however much of his property may have devolved upon them.[3]

913. *Widow's mournings.*—She is not entitled to mournings,[4] as part of the funeral expenses, either as against the executor or the creditors of her husband.[b]

914. *Curtesy of husband.*—The husband's title, by the curtesy of England, to a life estate in his wife's real estate after her death accrues when a child is born who may by possibility[5] inherit her real

[a] Co. Litt. 34 *b*; 12 Ves. 461. [b] *Johnson* v. *Baker*, 2 C. & P. 207.

IN SCOTLAND.

[1] The process takes place before the sheriff, and is called serving to the terce, which is necessary in order to give her an active title (*i.e.* enable her to sue). Ersk. 2, 9, 50. The actual division or kenning to the terce, followed by infeftment, vests the *jus in re*, and completes her real right.

[2] *Contra*; the widow can demand aliment from the executor till payment of her provision; Ersk. 1, 6, 41; 1 Fraser, 522; *Kerwade* v. *Storie*, 1 July 1831; though she has property of her own. *Ormiston* v. *Whitelaw*, M. app. Presumption, 4.

[3] *Contra*; the widow, if otherwise without means of support, is entitled to be alimented out of her deceased husband's estate. *Thomson* v. *M'Culloch*, M. 434; *M'Conochie* v. *M'Conochy*, 26 Feb. 1830; *Hebbs* v. *Munro*, 21 Feb. 1845; *Blake*, 3 D. B. M. 317.

[4] *Contra*; the widow is entitled to be paid out of her husband's estate the expense of decent mournings, which forms part of the funeral expenses, and is a privileged debt. *Buchanan* v. *Ferrier*, 14 Feb. 1822; *Shedden* v. *Gibson*, M. 11,855.

[5] *Contra*; the curtesy of the husband does not arise except where the child is actually the mother's heir, and where no other by a former marriage exists. Ersk. 2, 9, 53; Darleith, M. 3113.

estate, though the wife has left an heir by a prior marriage.[a] He is entitled by the curtesy, though the wife had purchased the estate.[b] [1] He is also entitled by curtesy to half of his wife's gavelkind, though no child has been born.[c] He is not entitled to curtesy of his wife's copyhold, except by special custom.[d] He is entitled to curtesy of his wife's equitable real estate.[e] [2] The husband's estate is initiate on the birth of the child, but it is not consummate until the wife's death.

915. *Husband's rights after wife's death.*—It makes no difference as to the rights of the survivor, that the marriage was dissolved within a year.[4] On the wife's death, the husband has an absolute right to be her administrator;[f] [5] and as such he takes absolutely, and not merely as a trustee for her next of kin, all her personal estate. This latter right is chiefly valuable where any of the wife's choses in action were not reduced into possession during the marriage, and where she had separate personal estate. Her next of kin, or executor, or administrator has no claim upon the husband for any part of his personal property, in the event of her predeceasing him.[6]

916. *Husband's right to maintenance.*—If the husband is destitute, he has no claim on his wife's executors or heirs for maintenance, however much may be the personal property she had left.

917. *Husband's liability after wife's death.*—The husband is liable for his wife's debts during the marriage; but if he pay them,

[a] 1 Cruise, Dig. 143.
[b] But see Wms. Real Prop. Ap.
[c] Co. Litt. 30*a*, *n.* (1).
[d] 2 Watk. Cop. 71.
[e] *Morgan* v. *Morgan*, 5 Madd. 408.
[f] Wms. Exec. 360. See *ante*, § 734.

IN SCOTLAND.

[1] *Contra;* the husband is only entitled to the curtesy if the wife succeeded to the estate whether as heir of line, tailzie or provision; Bell's Pr. § 1606; but not if she acquired it by purchase or donation.

[2] *Contra;* where the wife did not die infeft, the husband has no title by curtesy. Bell's Pr. § 1606.

[3] The same, since 1855, by 18 Vic. c. 23, § 6.

[4] *Contra;* if the wife predeceases the husband, leaving separate estate, her next of kin or executors are entitled. But they cannot now claim her share of the goods in communion. 18 Vic. c. 23, § 6.

[5] The same, since 1855, by 18 Vic. c. 23, § 6.

[6] *Contra;* he has a claim on her heirs or representatives. Hailes, 1012.

he has no relief after her death against her executor or heir, though she left ample property.[1]

918. He is liable for all her debts without distinction, though he received no fortune with her.[2]

919. On the other hand, if the wife's creditors have not recovered their debts against her from him during her life, he is not liable to pay them after her death, however ample a fortune she brought him;[a 3] and though she conveyed all her property to him during her life, subject to the ordinary exception of fraudulent conveyances.[4]

920. *Wife's separate estate.*—When real or personal estate is given or settled on a woman by an intended husband, or herself, or a stranger, it will be deemed separate estate if it appears from the terms of the will or deed that it was intended for her separate use;[5] and many vague expressions are translated by the court into this meaning.[b] The wife in such a case, however, will be able to dispose of such separate estate, unless there is a clause prohibiting her alienation or anticipation thereof, which prohibition will become void on the

[a] *Lewis* v. *Nangle*, Amb. 150; 3 P. Wms. 409; 1 Sch. & Lef. 263; *Woodman* v. *Chapman*, 1 Camp. 189.

[b] Story's Eq. Jur. 1380; 2 Spence, 502; 2 Jarman on Wills, 19.

IN SCOTLAND.

[1] *Contra;* if the husband be made to pay the proper debts of the wife, he has relief against her separate estate both before and after her death. Bell's Pr. § 1571; *Nairn* v. *Mercer*, M. 5860; Ersk. 1, 6, 17.

[2] *Contra;* the husband is not liable for the wife's heritable debts unless he was *lucratus*, as by having the *universitas* of the wife's property conveyed to him, etc. Her heritable debts are such as bonds excluding executors, etc. Ersk. 1, 6, 17, & 18; *Leslie* v. *Wallace*, M. 5853; Bell's Pr. § 1570; 1 Fraser, D. R. 297.

[3] *Contra;* the husband is liable to pay the wife's debts, even after her death, if he has had property through her exceeding a reasonable tocher, *i. e.*, *quantum lucratus*. Ersk. 1, 6, 17; *Smith* v. *Drummond*, 2 July 1829; M. 5874; see last note.

[4] *Contra;* if the husband, by the marriage contract, had the *universum jus* of the wife, heritable as well as moveable, assigned to him, he will be liable after her death for her debts, *quantum lucratus*. Ersk. 1, 6, 18.

[5] The separate estate, or *peculium*, can be created in like manner, either by the wife herself, or the husband, or a stranger. The mode of doing so is by excluding expressly the *jus mariti* and right of administration of the husband, and declaring the fund alimentary. Bell's Pr. § 1560; Ersk. 1, 6, 14; *M'Donald* v. *Loudon*, 27 Sc. Jur. 512; 1 Fraser, D. R. 428.

dissolution of the marriage, though it will revive on a subsequent marriage.[a] When a wife is judicially separated or obtains an order protecting her earnings, her property acquired subsequently becomes separate estate,[1] or rather, she is a *feme sole* with regard to such estate.

Wife's liability in respect of her separate estate.—Where the wife has a separate estate, she is not bound, out of it, to maintain the husband,[2] however destitute, nor her children,[2] nor to contribute any part towards family expenses; yet under the Poor Law Acts the parish could claim reimbursement for supporting the children if they were destitute.[b]

921. *Wife's alienation of separate estate.*—A wife may dispose of her separate personal estate as a *feme sole*, unless the contrary is expressly or impliedly stipulated.[c] And the wife's examination before a commissioner or judge, and her acknowledgment, are unnecessary with regard to her separate estate; though in some cases her examination may be necessary,[d 3] as where her power of disposing of it has arisen from a postnuptial agreement;[e] or where she disposes of an estate of inheritance given to her during coverture by a third party, without any express power to dispose of it.[f]

[a] *Tullett* v. *Armstrong*, 4 My. & Cr. 377; *Baggett* v. *Meux*, 1 Phill. 627; 2 Spence, 524.

[b] *Lamb* v. *Milnes*, 5 Ves. 520; *Hodgen* v. *Hodgen*, 4 Cl. & F. 323.

[c] Story's Eq. Jur. § 139; 2 Spence, 506.

[d] 2 Roper, 223; Watk. Conv. (8 ed.) 385 *n*.

[e] Story's Eq. Jur. § 1391; see *Moore* v. *Morris*, 4 Drewr. 37.

[f] Story's Eq. Jur. § 1388; 2 Spence, 504; *Harris* v. *Mott*, 14 Beav. 169.

IN SCOTLAND.

[1] *Contra;* the husband's *jus mariti* is not excluded by judicial separation.

[2] *Contra;* the wife is bound, out of her separate estate, to support the husband. Bank. 1, 6, 15; *Hutchison* v. *Hutchison's Trustees*, 10 June 1842; and also, it seems, the children, if destitute; 1 Fraser, D. R. 429.

[3] *Contra;* judicial ratification is equally necessary as to dispositions of the wife's separate property. Act 1481, c. 83; Ersk. 1, 6, 27; Bell's Pr. § 1614; see *Ritchie* v. *Rennie*, 4 Bell Ap. C. 221.

RIGHTS OF MARRIED PARTIES AS AFFECTED BY CONTRACT AND SETTLEMENT.

922. *Agreements in consideration of marriage.*—A promise or agreement, made in consideration of a future marriage, to pay money, or so as to affect property, is not binding, unless it is in writing and signed by the party promising, or his agent.[a] [1] Thus, if the father of one of the parties, or a third person, state verbally that he will pay a sum of money or leave a sum by will, or settle an estate to one or other of the parties on the marriage, this will not be binding,[b] unless, perhaps in a case of fraud, or where the parol promise before marriage is recognized by writing after marriage.[c] The writing need not be by deed. It may be by letter; but the consideration must distinctly appear [2] on the face of the document.[d]

923. *Barring legal rights by marriage settlement.*—In marriage settlements it is not necessary by express words [3] to bar the right of the wife or children to a share of the personal property, for these have no legal right, but merely the chance of a share, in the event of the intestacy of the husband. Hence the only mode of absolutely securing the wife and children some provision at the husband's death is by the introduction of a positive conveyance or covenant on his part in the marriage settlement.[4]

[a] Statute Frauds, 29 Ch. II. c. 3, § 4.
[b] *Montacute* v. *Maxwell*, 1 P. Wms. 619; *Hammersley* v. *De Biel*, 12 Cl. & F. 45.
[c] *Randall* v. *Morgan*, 12 Ves. 67.
[d] *Wain* v. *Warlters*, 5 East, 10.

IN SCOTLAND.

[1] The same, but on another ground; for, in general, writing is necessary as to land; and a promise to pay money must also, in general, be in writing. See *ante*, § 451 *n.*

[2] *Contra;* the consideration is in general unnecessary, and need not appear on the face of the writing.

[3] *Contra;* the *jus relictæ* of the wife and the *legitim* of the children must be expressly, or by clear implication, barred by antenuptial settlement.

[4] *Contra;* the reverse is the rule. The only mode in general of taking away the wife and children's legal rights, is by antenuptial marriage contract, securing a reasonable provision in lieu thereof, and by express words or clear implication excluding the rights. *Breadalbane* v. *Chandos*, 2 Sh. & M'L. 377; Bell's Com. by Shaw, 680, 682.

As to the *jus relictæ*, the wife may renounce it in her marriage contract, provided this be done expressly, or it be at least clearly implied and not

924. *Dealing with dower.*—As regards the widow's dower, the husband (if married since 1834) will have it in his power to defeat her claim, by deed or will, unless the settlement contain a covenant or agreement on his part not to bar it. Thus it requires express words to effectually prevent him from defeating the dower of the widow.[a] [1]

Jointure, etc., barring dower.—A jointure, if given before marriage, bars dower;[b] but now a bequest of personal estate is no bar, unless it is so intended.[c]

925. *Provision to widow.*—Where a husband has covenanted to leave his widow a provision out of his personal estate, and he dies intestate, so that she is entitled to a share under the Statute of Dis-

[a] 3 & 4 W. IV. c. 105.

[b] 27 Hen. VIII. c. 10; 2 Bl. Com. 138; 1 Cruise, 7, 1, 21. [c] 3 & 4 W. IV. c. 105, § 10.

IN SCOTLAND.

inferred from ambiguous circumstances. Bell's Pr. § 1581. A certain sum or annuity on survivance is often provided as a compensation. If the wife do not discharge her *jus relictæ*, she will in general be held entitled to both that and her conventional provisions, though the conventional provisions taken alone may have been reasonable. But where there is a plain intention by the marriage contract to regulate the whole succession, it may be inferred that a virtual discharge of the *jus relictæ* was intended. *Ibid.* The *jus relictæ* may also be effectually renounced in a postnuptial contract of separation, provided it be onerous (for valuable consideration) and so irrevocable. *Ibid*, § 1591. But the husband cannot by will, or by *mortis causa* deed, exclude the *jus relictæ*, though he may leave her a sum on condition of her accepting it in satisfaction of the *jus relictæ*, in which case she cannot take both.

As to the *legitim*, it may be defeated by a clause in an antenuptial marriage contract providing a sum in full of the children's claim of legitim. It is not however enough by general words to discharge the legitim, it must be expressly discharged. No provision to children in full of legitim in a postnuptial contract or deed of settlement will defeat that right, unless accepted by the children. Bell's Pr. § 1949; see *Fisher* v. *Dixon*, 2 Bell's Ap. 63. Legitim cannot be defeated by the father's will, nor in general by any deed *mortis causa*, or on deathbed. *Ibid*, § 1585; Bell's Com. by Shaw.

[1] *Contra;* the reverse rule holds. It requires express words to bar her terce. A provision by jointure, locality, etc., however, *prima facie* discharges the claim of terce. 1681, c. 10; Ersk. 2, 9, 45. Jointure, as a substitute for terce, is an annuity secured on land, or by assignment of rents, the wife's preference depending on the completion of her real right. *Locality* is an appropriation of certain lands to the wife in liferent, her security requiring to be completed by infeftment. If, by fault or fraud of the husband, the jointure, or locality, etc., should be left unsecured, the wife seems entitled to recur to her terce. Bell's Pr. § 1947.

tributions, the general rule is that she cannot[1] claim both, and if the distributive share is less than the amount of her provision, then it is counted as part payment.[a] But in some cases she may claim both.[b]

926. *Advancement of child.*—Where a father dies intestate, and any child (except the heir-at-law) has obtained any provision, whether an estate in land, or a pecuniary portion out of the father's personal estate, this is counted an advancement, and is a discharge, in whole or part, of the distributive share.[c] And the deed need not expressly state[2] that the provision is in full discharge of such distributive share. Yet land devised by the father will not count as part payment of the distributive share.[d]

927. *Usual strict settlement.*—In settlements of real property, whether belonging originally to the husband or wife, one or more terms are usually conveyed to marriage trustees for the purpose of raising portions for the younger children, and, subject thereto, the estate is limited to the eldest and other sons, successively in tail male, and the concluding limitation is generally to the settlor himself in fee. The effect of this is to prevent the estates being alienated till some tenant in tail attains the age of twenty-one. This is called a strict settlement, being the most stringent mode of tying up the property allowed by the rules of law.[3]

928. *Construction of marriage settlements.*—The construction of marriage settlements varies from that of wills in many respects as

[a] *Garthshore* v. *Chalie*, 10 Ves. 1; Wms. Exec. 1343.

[b] *Couch* v. *Stratton*, 4 Ves. 391; *Oliver* v. *Brigland*, 3 Atk. 420; *Lang* v. *Lang*, 8 Sim. 451. See *ante*, § 738.

[c] 22 & 23 Ch. II. c. 10, § 5.

[d] 2 P. Wms. 440; *Twisden* v. *Twisden*, 9 Ves. 425; Wms. Exec. 1351.

IN SCOTLAND.

[1] *Contra;* she may in general also claim her *jus relictæ*, unless she has expressly discharged it. Bell's Pr. § 1946; see *ante*, § 923.

[2] *Contra;* legitim is not defeated without express words or strong implication; Bell's Pr. § 1949; see *Kippen* v. *Darley*, 30 Sc. Jur. 563; 3 Macq. 203, as to a marriage portion, and *ante*, § 711; moreover, an advance is not presumed a payment *pro tanto* of the child's share of the dead's part.

[3] *Contra;* the intervention of trustees is unnecessary, and the estate can be tied up for ever by means of a deed of entail, subject now, however, to the right of the heir in possession, with certain consents of the next heirs substitute to break the entail. Marriage contracts, where the property is large, frequently assume the form of an entail of the property.

regards limitations to children and issue, wills being more liberally construed than deeds in that respect.[1] Moreover, legacies and devises to particular persons have a certain effect prescribed to them by statute;[a] thus devises to children of estates in fee-simple and estates tail, and bequests to children, do not lapse by the death of the child before the testator.

[a] 1 Vic. c. 26. See *ante*, § 721.

IN SCOTLAND.

[1] *Contra;* land can only be conveyed by a *de presenti* disposition, and there is no difference of construction between deeds and wills. In both the above cases, there is in general no lapse by the child predeceasing. See *ante*, § 722. Owing to the practice of dispensing with trustees, various rules have been settled as to the construction of terms and phrases in the destination of marriage contracts, of which the following are some :—

A conveyance, either by the father, A, or a third party, "to A and his children or issue," is construed thus: If the subject is moveable property, a destination to A and his children, or to A and the heirs of the marriage, will give the fee to A, *i. e.*, A can sell the property, without regard to the *spes successionis* of the children. So also where the destination is to "A in liferent and to the children in fee." But if it is to A in liferent *allenarly* (only), and to the children in fee, then A does not take the fee. *Macintosh* v. *Gordon*, 4 Bell's Ap. 105; Bell's Com. by Shaw, 694.

When the destination is of heritage, and is to A and his heirs, or A and the heirs of the marriage, the fee is also in A. But, where the destination is "to heirs of the marriage, to sons, etc.," or where A is bound at a certain time to invest the heirs, though A can alienate the estate for onerous cause in his lifetime, he cannot gratuitously defeat the heir's succession. M. 13,040. In such cases, the children are said to be creditors among heirs, but only heirs among creditors. *Per* L. Corehouse in *Browning* v. *Hamilton*, 15 S. D. 999; Bell's Com. by Shaw, 694; 1 Fraser, D. R. 783.

When the destination is to A in liferent allenarly and to his children *nascituri* in fee, A is said to have a fiduciary fee and to be a trustee for the children. But what his powers are as a fiduciary fiar has not been very clearly defined. *Houlditch* v. *Spalding*, 9 D. B. M. 1204; 3 Ross, L. C. 667; *Elmslie* v. *Fraser*, 12 D. B. M. 724.

Where the destination is to A and B (his wife) in conjunct fee and liferent, and to the children *nascituri* in fee, certain rules as to discovering where the fee is, are laid down. Thus, if the property came from B, the fee is, *prima facie*, in her. M. 4279, 4491; *Dewar* v. *Campbell*, 1 W. S. 161; *Muirhead* v. *Paterson*, 2 S. D. 617. If there is a faculty given to A or to B to dispose of the property, *prima facie*, the fee is in the holder of the faculty. *Baillie* v. *Clark*, 23 Feb. 1809, F. C. Where the heirs of A or of B are called next after the children, then the fee is in the party whose heirs are so called. M. App. Prov. No. 6; see also Bell's Pr. § 1950, *et seq.*; Menzies on Conveyancing.

929. *Wife's trustees.*—Where the wife has property of her own, which it is intended to place beyond the reach of the husband, the uniform practice is to convey such property to trustees to hold for behoof of the wife on the trusts therein declared.[1]

930. *Covenant to settle after-acquired property.*—Where either of the married parties is likely to acquire property by succession, will, or otherwise, during the marriage, and it is intended that when it is acquired it shall be settled, either on trusts the same as those already declared in the marriage settlement or pointed out therein, it is usual for both the parties to enter into a covenant with the trustees of the marriage to settle such property whenever they shall succeed to it.[2]

931. *Restriction on husband's alienation.*—A trust cannot be created with a proviso that the interest of the *cestui que trust* shall not be aliened, or shall not be made subject to the claims of creditors. If it is clear that the *cestui que trust* was intended to take a vested interest, then that interest may pass to his assignees in bankruptcy or insolvency.[a] Where, however, a fund is given to trustees in trust, to apply the whole or such part as the trustees think fit for

[a] Lewin on Trusts, 133.

IN SCOTLAND.

[1] It is not an invariable practice to convey the wife's property to trustees, though it is becoming more general than it used to be. Moreover, there is something intermediate to a direct conveyance to trustees, viz., where certain third parties are nominated in the marriage contract at whose instance implement may be obtained in favour of the wife and children. This entitles these third parties to inquire whether the husband has fulfilled his contract, and failing his doing so, they may concur with the wife in taking proceedings to compel him to do so.

[2] This practice is not very general. But it is often a part of the marriage contract that the *conquest* of the husband, *i. e.*, what he shall acquire by purchase (but this does not, *prima facie*, include succession), shall be subject to the wife's liferent. In that case the widow will be ranked as a creditor. Menz. on Convey. 425. But if her claim is to be preferable to creditors, the fund must be separated by expressly appropriating it to her use and excluding the *jus mariti*, or conveying it to trustees. It is as competent to exclude the *jus mariti, quoad acquirenda*, as it is to *acquisita*.

The children will rank as creditors on his bankruptcy, if the father settle a sum payable, not at his death, but at a fixed date, or at a date which may arrive during his life, as, for example, at majority or marriage. *Ballantyne* v. *Dunlop*, 17 Feb. 1814, F. C.; *Jolly* v. *Graham*, 16 D. B. M. 730; *Cruikshanks* v. *Cruikshanks*, 16 D. B. M. 7; *Brown* v. *Govan*, 1 Feb. 1820, F. C.

the support and maintenance of A, and for no other purpose, it seems nothing passes to A's assignees.[a] But though a person cannot put a restraint upon alienation or exclude creditors, it is competent to settle property on A, a third person (though not upon the settlor himself), *until* alienation, bankruptcy, or insolvency, with a limitation over on the happening of either of those events; or an estate may be given to A absolutely in the first instance, with a proviso that on alienation, bankruptcy, or insolvency, the estate shall shift over to B.[b] But alienation, in this sense, is taken to mean, *prima facie*, a voluntary alienation, and not bankruptcy, unless the contrary is clearly expressed. And though a person cannot settle his own property on himself in this way, yet he may settle a fund of his own equal to any portion he may have received with his wife.[c] [1]

[a] *Twopenny* v. *Paxton*, 10 Sim. 487; *Godden* v. *Crowhurst*, 10 Sim. 642; *Rippon* v. *Norton*, 2 Beav. 63; *Page* v. *Way*, 3 Beav. 20; *Low* v. *Bunn*, 2 Y. & C. 98; *Kearsley* v. *Woodcock*, 3 Hare, 185.

[b] Lewin on Trusts, 135.

[c] *Ibid*, 136.

IN SCOTLAND.

[1] So the rule is recognized that no person can reserve to himself, directly or through trustees, any part of his property, so as to exclude the diligence of his creditors. But a donor may effectually convey to a third party property in this way, whether by way of marriage contract or not, which shall be inaccessible to that party's creditors. This is done by expressly declaring the fund to be *alimentary*, or that it shall not be subject to arrestment or any other diligence of creditors, and it is safer to use both these phrases. Bell's Com. by Shaw, 528; Stair, 3, 1, 27; Ersk. 3, 6, 7; see *Harvey* v. *Calder*, 2 D. B. M. 1095; *Rennie* v. *Ritchie*, 4 Bell's Ap. 221. Where there is no express declaration to this effect, the mere fact that a fund is the sole fund of subsistence does not make it alimentary. M. 10,396; *Smith* v. *E. Moray*, 13 Dec. 1815, F. C. Moreover, though an alimentary fund is secure against creditors, it will not be so, if it is excessive, that is, out of proportion to the rank of the party. Ersk. 3, 6, 7; Elchies, Alim. No. 7; *Monypenny* v. *E. Buchan*, 13 S. D. 1112; *Harvey* v. *Calder*, 2 D. B. M. 1099.

There is a certain privilege which attaches to alimentary creditors, *i.e.*, those who supply the necessaries for aliment, viz., that those who during any particular year supply the aliment of that year have a preferable claim upon that year's fund over other alimentary creditors. Bankt. 1, 159, 14; 5 Br. Sup. 338; *Waddell* v. *Waddell*, 15 S. D. 151.

PART V.

PUBLIC LAW.

CHAPTER I. CRIMES AND CRIMINAL PROCEDURE.

II. THE CHURCH.

III. POOR LAWS, PEERS, ELECTIVE FRANCHISE, ETC.

CHAPTER I.

CRIMES AND CRIMINAL PROCEDURE.

940. *Jurisdiction of criminal courts.*—The Court of Queen's Bench has a universal criminal jurisdiction, but practically this is confined to difficult cases removed from inferior criminal courts by *certiorari*, a writ which is only granted on showing good gronnds.[a] [1] The higher crimes are tried by the common law judges, who are appointed judges of assize by special commission, and traverse the country twice, and in some districts thrice a year,[2] for the purpose of gaol delivery. As a general rule, prisoners can only be tried in the county where the offence was committed, and where the venue is said to be laid, the venue of the offence being stated in the margin of the indictment. For it was a rule of the common law that a grand jury had no authority to inquire into any offence which was not committed, wholly or in part, within the district for which they served.[3] But several exceptions are made by statute for particular offences, and now where it can be shown that a fair trial is not likely to be had in the county where the offence was committed, whether from prejudice or otherwise, the Court of Queen's Bench has power to order the trial to take place in the Central Criminal Court in

[a] 16 Vic. c. 30, § 4.

IN SCOTLAND.

[1] A criminal trial cannot be removed into the Court of Session, which is the supreme civil court; but all the higher crimes are tried by the High Court of Justiciary, and the inferior crimes are tried by the sheriff. Seven of the judges of the Court of Session act as the judges of the Court of Justiciary.

[2] The Court of Justiciary, which is the superior criminal court, and its judges, who are seven in number, also traverse the country, which is divided into three circuits. 1 W. IV. c. 69.

[3] *Contra*; the Court of Justiciary can appoint any place for the trial of a prisoner, and grand juries are unknown.

London.[a] A judge sitting alone tries criminal cases at the assizes,[1] but in the metropolitan district two judges sit on the trial of the higher offences in the Central Criminal Court, which is a court for the trial of crimes committed in the metropolis and adjacent counties, and which sits generally once a month.

The inferior crimes committed in rural districts are tried at Quarter Sessions by magistrates who are generally unpaid, and whose jurisdiction is limited by statute;[b] and in cities and boroughs similar offences are tried by recorders, who are generally practising barristers, and who are paid by salary.[2]

941. *Civil remedy for crime, how far barred.*—Where a party has committed a felony, the civil remedy against the felon and those with whom he must be sued is suspended until the felon has been prosecuted and convicted.[3] Where stolen goods have been bought *bona fide* in a market overt, the purchaser has a good title against all but the owner, who can at once sue the possessor, or a writ of restitution may be awarded by the Criminal Court, unless the property is a valuable or a negotiable security which has been *bona fide* discharged.[c] The owner is not bound to prosecute and convict the

[a] 19 Vic. c. 16.
[b] 5 & 6 Vic. c. 31.
[c] 7 & 8 Geo. IV. c. 29, § 57; *Scattergood* v. *Silvester*, 15 Q. B. 506.

IN SCOTLAND.

[1] *Contra;* two judges of the Court of Justiciary always sit together on circuit, and on important cases tried in Edinburgh four judges frequently sit together, but three are a quorum. The Lord Justice-General may, on circuit, sit alone. 1 W. IV. c. 69, § 19. And so may each of the two judges who sit at Glasgow in discharging the duties of the Justiciary Court there. 11 & 12 Vic. c. 79, § 8.

[2] All inferior crimes are tried by the sheriff, who is a paid judge, and who is also the permanent judge ordinary of the county, having an extensive civil jurisdiction also. He must be a counsel practising at the bar, and attending the Court of Session. The sheriff has one or more substitutes, who reside locally and discharge the chief business. The Court of Justiciary has the power of reviewing the sentences of all inferior criminal courts, unless excluded by statute, and this is done by advocation, suspension, or appeal, according to the stage of the proceeding in the court below. Alis. Pract. 25.

[3] *Contra;* there is no qualification of the right of the owner of stolen goods to recover them from the thief or any innocent purchaser, whether bought in open market or not. The owner can claim their restitution wherever he finds the goods. M. 9112; 1 Bell's Ill. 417.

thief before he can recover stolen goods from a third party, though an innocent purchaser.[a] When a misdemeanour has been committed, the civil remedy is not suspended, yet when an indictment and a civil action are both pending, the court will either grant a *nolle prosequi* or compel the prosecutor to elect which remedy he will pursue.[b] [1]

942. No civil damages, whether arising directly or indirectly out of a criminal act, or costs can be awarded to the injured party against the criminal by the criminal court, though this course has been recommended to the legislature.[c] [2] But in many cases an action may be brought by a party suffering special and individual damage over and above the public wrong.[d] [3]

943. *New trial in criminal cases.*—A new or second trial cannot be had in criminal cases on the merits,[4] as where the verdict was not warranted by the evidence, where the judge misdirected the jury, and other grounds known in civil cases. If, however, there is a technical error on the record, a writ of error lies to the Queen's Bench, and thence to the House of Lords. And in felonies or misdemeanours tried in the Queen's Bench, or removed thither by certiorari, a new

[a] *Lee* v. *Bayes*, 18 C. B. 599; *White* v. *Spettigue*, 13 M. & W. 603.

[b] 2 Burr. 270; 1 Chit. Cr. L. 477.

[c] Per Lord Denman; 8 Rep. Cr. L. Com. 212.

[d] *Wilkes* v. *Hungerford Market Co.* 2 Bing. N. C. 281; *Henley* v. *Mayor of Lyme Regis*, 5 Bing. 91; *Mackinnon* v. *Penton*, 8 Exch. 319.

IN SCOTLAND.

[1] The civil remedy is not barred in any case. 2 Hume, 71, 249; Bell's Pr. § 2216; M. 14,078; *Wilsons* v. *M'Knight*, 8 S. D. 398; *Hill* v. *Fletcher*, 10 D. B. M. 7; *Linwood* v. *Hathorn*, 1 Sh. Ap. 20. And where the injured party has recovered damages, the Crown may still prosecute. Alis. Pr. 64; 2 Hume, 260; *Miller* v. *Moffat*, 2 Murr. 308. The widow and relatives of a person killed by culpable homicide can sue for assythment, or damages for loss of such relative, which damages may be assessed by the Court of Justiciary. 1 Hume, 286.

[2] *Contra;* this seems to have been the ancient law; 2 Hume, 32, 118; Alis. Pract. 3, 100; but it is practically obsolete.

[3] The same. *Caledonian R. Co.* v. *Ogilvy*, 2 Macq.; 27 Sc. Jur. 350.

[4] So a new trial cannot be had on the merits, as, for example, that the verdict is contrary to evidence, the general rule being that no one can thole an assize twice for the same offence. Alis. Pract. 662; Bell's Sup. 299. And no appeal lies from the Justiciary Court to the House of Lords. Alis. Pract. 677; see next note.

trial may be granted on the ground of surprise,[a] or on the improper ruling of the judge against the prisoner.[b] But few crimes are now tried in the Court of Queen's Bench.

Where, however, the judge is doubtful as to the admissibility of evidence or other point of law, he may reserve the case for the Court of Criminal Appeal,[1] but this is a matter of discretion only, and the Court of Appeal cannot order a new trial, if they disagree with the judge below.

Where injustice has been done, the only practical remedy is to apply to the Home Secretary to advise the Crown to remit or commute the sentence.

944. *Public prosecutor.*—There is no public prosecutor appointed for the purpose of prosecuting crimes, whose duty it is to take the initiative.[2] And there is no legal duty imposed on any person to prosecute. But any person, though in no way individually injured by the crime, may, if he choose, in general prosecute.[3] In several districts the magistrates voluntarily appoint an officer to act as the prosecutor. Whenever an offence is of sufficient importance to be

[a] *R.* v. *Whitehouse*, 1 Dearsl. 1.
[b] *R.* v. *Alleyne*, 1 Dearsl. 505; *R.* v. *Scaife*, 17 Q. B. 239; 2 Den. C. C. 281.

IN SCOTLAND.

[1] *Contra;* there seems to be no general power to reserve cases, though the point has been raised whether, at a trial on circuit, a question as to the admissibility of evidence can be reserved or certified for the High Court of Justiciary. *R.* v. *Fraser*, 24 Sc. Jur. 491, 614. In that case the judges on circuit certified the case to the High Court, but did not name any day for the continuation of the diet, and it was held that this objection was fatal, on the ground that all diets are peremptory.

[2] *Contra;* the Lord Advocate and his four depute-advocates and his local representatives, called procurator-fiscals, are charged with this special duty. 2 Hume, 130. The Lord Advocate is entitled to prosecute for all crimes committed within Scotland. He can delegate the office, and generally does so, upon his deputes who are practising counsel, and are paid by salary. The Lord Advocate is master of his libel, and may pass from any charge at pleasure, and restrict the libel to an arbitrary punishment before moving for sentence. Alis. Pract. 84.

[3] *Contra;* if the public prosecutor refuse, the private party injured or his kinsmen may prosecute, but not strangers. 2 Hume, 125; Alis. Pract. 99, 104. A private prosecutor must prosecute with concourse of the Lord Advocate, and the latter cannot refuse to give such concourse except on good grounds. *Ib.* 111.

taken up by the Government, the Attorney-General, by virtue of his office, conducts the prosecution. And in the case of the Bank, Post Office, and Mint, particular counsel are generally employed, who represent the Attorney-General. Yet in all cases the Crown is in theory the prosecutor.

Private prosecutor.—The task of prosecuting is thus generally undertaken by the party mainly injured by the crime, and he selects his own counsel to conduct the proceeding. Though he is in general entitled to be reimbursed his expenses, he is frequently a loser, and is always inadequately remunerated. If he has no reasonable or probable cause, *i.e.*, if no crime was committed, or he had no good ground for believing so, he is liable to an action for false imprisonment or malicious prosecution, according to circumstances, and this risk is sufficient to deter strangers from interfering in prosecutions.[1]

945. Though no person is bound to prosecute, or to go on with a prosecution once commenced, yet after a person has charged a criminal before a magistrate, the latter may bind him over to prosecute, and even in other cases where the prosecutor stops short before that stage, he seldom escapes being sued for damages by the party charged, from which risk practically there is little protection. Hence no prudent person, whose time is valuable, ever volunteers to become a prosecutor except in very clear cases, in which he himself is principally concerned.

946. *Action against justice of the peace.*—No action can be brought against a magistrate for maliciously committing a person, or otherwise acting irregularly as a magistrate, after six months[2] from the injury.[a]

947. *Nolle prosequi.*—A prosecutor cannot enter a *nolle prosequi*

[a] 11 & 12 Vic. c. 44, § 8.

IN SCOTLAND.

[1] The Lord Advocate is not liable to any action, but a procurator-fiscal is so; and the Lord Advocate may be compelled by the court to give up the name of his informer, the latter being liable to an action in case of malice or no probable cause. 2 Hume, 136; Burnet, 313; see Marjoribanks, 1 Murr. 232; Alis. Pract. 95.

[2] The action cannot be brought after three years. 2 Hume, 116.

without leave of the Attorney-General; and even then the *nolle prosequi* is not a bar to a fresh trial.[a 1]

948. *Prosecutor condemned in costs.* — The prosecutor, though acting oppressively, cannot be condemned in costs by the criminal court.[2] Nor is a prosecutor bound to find security against costs.[3]

949. *Limitation of prosecution for crimes.*—There is no limitation of time or prescription applicable to crimes[4] after which an indictment cannot be prosecuted, except in a few special cases, as treason, poaching, smuggling, etc.; the difficulty of proof is merely increased after a great lapse of time.

950. *Classification of crimes.*—Crimes are classed under three heads, treason, felony, and misdemeanour.[5] The distinction between the two latter does not depend entirely on the severity of the punishment, nor perhaps on the moral turpitude involved in the offence. The distinction is old, and it has been the practice of the legislature, in creating fresh crimes, to declare whether they were felonies or misdemeanours. The chief practical difference consists

[a] *R.* v. *Mitchell*, 3 Cox C. C. 93; 1 Chit. Cr. L. 478, 480.

IN SCOTLAND.

[1] A private prosecutor may, by a disclamation of process, create a bar to a fresh trial. Alis. Pract. 115; 2 Hume, 129. And he is at liberty, without any leave, to do so. When the public prosecutor has discovered a flaw in the libel or executions, as for not giving notice of a witness, etc., he may be allowed to abandon the libel without prejudice to renew it at another time. He cannot, however, at discretion desert the diet *pro loco et tempore*, and requires leave of the court to do so, when the court considers the circumstances under which he asks leave. So the court may itself desert the diet, which allows a new trial. But if the prosecutor being present move to desert the diet *simpliciter*, this is a bar to a future trial. 2 Hume, 277; *Stewart* v. *Mackenzie*, 29 Sc. Jur. 345.

[2] *Contra;* a private prosecutor or the procurator-fiscal may be made to pay costs. 2 Hume, 127, 138; Alis. Pract. 98, 113.

[3] *Contra;* a private prosecutor must find caution to insist in the prosecution; he is also liable to an action if the prosecution is malicious. Alis. Pract. 113.

[4] *Contra;* there is a prescription of twenty years, unless the criminal has absconded, etc. 2 Hume, 136; Maclaurin, No. 90.

[5] There is no such classification, all (except treason, which is put on the same footing by statute) being called crimes indiscriminately. Four of the higher crimes are known as pleas of the Crown, viz., murder, rape, robbery, and wilful fire-raising, which can only be tried in the Court of Justiciary.

in the legal incidents attaching to conviction of these crimes. In capital felonies the prisoner forfeits both his real and personal estate.[1] In felonies not capital, he forfeits only his personal estate.[2] In misdemeanours the prisoner forfeits nothing.

THE PROCEEDINGS BEFORE THE MAGISTRATE.

951. *The preliminary charge before a magistrate.* — Where an offence has been committed, except in the case of death, there is no authority vested in justices of the peace, or any other functionary, to institute any inquiry for the purpose of detecting the offender; before the justice can act, some particular individual must be charged before him with an indictable offence.[3] It was until recently optional with the prosecutor in all cases to charge the accused in the first instance before a magistrate; the party could, as afterwards stated, also be indicted before a grand jury without any such preliminary proceeding.[4] The exceptions recently created by statute are mentioned *post*, § 958.

If the accused party is not willing to attend, the magistrate issues a summons in the first instance, which is a mere citation, and on failure to attend a warrant is issued for the party's apprehension.

IN SCOTLAND.

[1] *Contra;* sentence of death involves no forfeiture of the heritable estate. 2 Hume, 483.

[2] *Contra;* not even the moveable estate is forfeited, except in a few cases, as deforcement, bigamy, perjury, and some other offences. 2 Hume, 492.

[3] *Contra;* it is the duty of the procurator-fiscal to take the initiative in all cases of an offence committed, and to investigate into rumours as to the guilty party, though no individual has been charged. He collects the evidence, and if necessary applies to the sheriff for a warrant to apprehend the individual who is supposed to have committed the offence. When the evidence is brought together and put in the shape of precognitions, these are transmitted to the Crown counsel, who reads them over and judges whether there is a *prima facie* case against the prisoner. If he thinks there is none, he directs the immediate discharge of the prisoner. If he thinks there is a *prima facie* case the prisoner is detained, subject to bail, where that is competent, and afterwards an indictment is prepared.

[4] *Contra;* it is not optional, but compulsory; but see *post.*

If it is a serious crime, or it is not likely a summons will be effectual, he may issue, in the first instance, a warrant for the apprehension of the person charged, but in that case the informant must state the facts on oath.[a] [1] The warrant is sealed by the judge.[2] The constable must, after the apprehension, take the prisoner without any delay before a magistrate; but may confine him in prison for a night, if there is no earlier opportunity of seeing a magistrate.[3]

952. *Interrogating the prisoner.*—When the accused is brought before the magistrate, it is contrary to law to interrogate him by putting specific questions as to the offence charged against him.[4] The prisoner is invited, however, after all the evidence against him is concluded, to make any statement he pleases, being first cautioned[5] that he is not bound to say anything, and that what he says will be used against him, but that he has nothing to hope or fear from any inducement or threat held out to him.[b] The magistrate is bound to address the prisoner in the following words, or words to this effect, "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you

[a] 11 & 12 Vic. c. 42, § 1. [b] 11 & 12 Vic. c. 42, § 18.

IN SCOTLAND.

[1] *Contra;* a warrant is always issued in the first instance, and without oath.

[2] *Contra;* no seal is used by a magistrate on granting a warrant.

[3] The constable must not commit to prison, and twenty-four hours' delay is unreasonable. M'Donald, 8 Dec. 1851 (Justic.)

[4] *Contra;* it is usual for the procurator-fiscal or public prosecutor to ask specific questions, but the prisoner is told he is not bound to answer them, yet in practice he always does so. 2 Hume, 328; Burnett, 492; Alis. Pract. 560; *R.* v. *Kelly*, 1 Broun, 547. It is also the duty of the magistrate to put specific questions to the prisoner, unless the prisoner say he will answer none. *R.* v. *Bell*, Arkley, 1. It is also the duty of the magistrate to be present while the prisoner is emitting his declaration or being examined, in order to check anything stated to the prisoner having the nature of holding out an inducement to him to confess, and to see that the proceedings were regularly conducted; and if the magistrate is absent during any material part of the examination, such declaration will be rejected. *R.* v. *Mahler*, 29 Sc. Jur. 562.

[5] *Contra;* the caution to a criminal when brought before the magistrate that he need not make any declaration, though usual, is not indispensable, and need not be proved at the trial. 2 Hume, 330; Alis. Pract. 564.

desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you on your trial." The statement, if thereafter made, is taken down and signed by the magistrate and by the prisoner, and transmitted along with the depositions, and is admissible in evidence at the trial without further proof.[a 1]

953. *Examination of witnesses before magistrate.*—The witnesses are examined on oath[2] before the magistrate on this preliminary charge. The accused must invariably be present,[3] and he is entitled to appear[3] by attorney and counsel, and to cross-examine all the witnesses.

954. The witnesses are examined in each other's presence,[4] though at the request of either party, the rest may be ordered to be out of hearing. After each witness is examined, he signs his deposition. The magistrate has power to exclude the public, but seldom or never does so.[5] The magistrate, it seems, has no power to order witnesses for the defence to attend,[6] and it has even been doubted whether he has power to examine them when they do attend; but in practice he generally does hear such witnesses, if they attend.[b] The accused has, however, an absolute right, by himself or counsel, to

[a] 11 & 12 Vic. c. 42, § 18.
[b] See 11 & 12 Vic. c. 42, § 34; 2 C. & K. 845.

IN SCOTLAND.

[1] *Contra;* it must be proved at the trial that the prisoner was in his senses when he made the declaration, and that it was freely given and not extorted. 2 Hume, 328; Alis. Pract. 557; *R.* v. *Hay*, 31 Sc. Jur. 30. Hence the magistrate and another witness are usually called to prove it. 2 Hume, 327; Alis. Pract. 558. The statement or declaration must be signed by witnesses who were present when it was made. Alis. Pr. 565.

[2] *Contra;* unless the witness is reluctant, he is not examined on oath before the magistrate. 2 Hume, 378; Alis. Pract. 504.

[3] *Contra;* the prisoner need not be present, and is not entitled to be so, at the examination of the witnesses against him before the magistrate. 2 Hume, 82.

[4] *Contra;* witnesses are not examined in each other's presence. 2 Hume, 82.

[5] *Contra;* the proceeding before the magistrate is private.

[6] The same. 2 Hume, 82. But as the proceeding is *ex parte*, the prisoner has no opportunity to call his witnesses.

cross-examine every witness adduced against him.[1] If a witness die before the trial, his deposition may be given in evidence.[2]

955. *Remand and bail.*—If all the witnesses cannot attend, the magistrate can remand the prisoner from time to time, not exceeding eight days at one remand.[a 3] When the accused is committed, the magistrate, in all cases of felony and in some of the gravest misdemeanours, has a discretion as to accepting bail,[4] but in the other misdemeanours he is bound to accept reasonable bail.[b]

956. *Search warrant.*—Where a search warrant is applied for, it is granted only upon oath.[c 5] It must specify the particular house to be searched.[d 6]

957. *Grand jury.*—Before the accused can be put on his trial, he must, over and above the examination before the magistrate, be charged on an indictment found by the grand jury.[7] The grand jury consists of from twelve to twenty-three persons, being inhabitants of the county, who examine the witnesses behind the back of the accused, and in his absence, and if satisfied by a majority of not less than twelve that there is a *prima facie* case against him, endorse on the indictment "a true bill;" if otherwise, "no true bill."[e] Formerly when they threw out the bill, they used to endorse on the back of it "ignoramus," signifying that they ignored the bill and rejected it. The persons composing the grand jury appoint one of

[a] 11 & 12 Vic. c. 42, § 21.
[b] *Ibid*, § 23.
[c] 7 & 8 Geo. IV. c. 29, § 63.
[d] 7 & 8 Geo. IV. c. 29.
[e] 6 Geo. IV. c. 50; 5 & 6 W. IV. c. 76; 2 & 3 Vic. c. 71.

IN SCOTLAND.

[1] *Contra;* the taking of the precognition of witnesses is an *ex parte* proceeding, and the prisoner has no right to be present and is not present. It is usual, however, for the prosecutor's witnesses to be precognosced before the trial (*i. e.*, asked what they have to say) by the panel's agent, though the prisoner has no right to compel the witnesses to submit to be precognosced. *R.* v. *Fletcher*, Arkl. 232.

[2] The same.

[3] No limit is fixed to the power of ordering a remand, but in practice a short date is always specified. *Arbuckle* v. *Taylor*, 3 Dow, 186.

[4] Nearly the same. 2 Hume, 96; Alis. Pract. 160.

[5] No oath seems to be required except in some cases. 2 Hume, 77.

[6] It seems the same. 2 Hume, 78; *Webster* v. *Bethune*, 29 Sc. Jur. 185.

[7] *Contra;* there is no grand jury, but see next note.

their number as their foreman, and they all take an oath to act impartially. The prisoner may object to any one of the grand jurors on account of disqualification, and it seems, may do so before the petit jury are sworn.[a] The witnesses are examined on oath. The grand jury is not bound to hear exculpatory evidence, and as the prisoner is not present, nor any representative, there is no opportunity for tendering it. As the jury has, in general, no legal adviser, they often admit evidence which is not legal. Moreover, as few persons are present besides the grand jury, witnesses are seldom indicted for perjury before such jury, though a grand juror may give evidence in such a case.

WHERE NO PREVIOUS EXAMINATION BEFORE A MAGISTRATE.

958. *Without going before a magistrate.*—Even where there has been no preliminary examination before the magistrate, or after such examination and dismissal of the charge, any person can, in most cases, go with witnesses before a grand jury, and without notice to the defendant charge him with an indictable offence.[1] The grand jury perform the same functions in the one case as the other.

Vexatious indictments.—The exceptions recently created to the right of the prosecutor to go before the grand jury in the first instance, are contained in the Vexatious Indictments Act.[b] By that Act, no indictment for perjury, subornation of perjury, conspiracy, for obtaining money or goods under false pretences, for keeping a gambling-house or disorderly house, or for an indecent assault, can now be preferred to a grand jury, unless the prosecutor has been previously bound over by a justice of the peace to prosecute, or the indictment has been ordered by a judge of the Superior Courts, or has been preferred with the consent of the Attorney-General.

[a] 1 Chit. Cr. L. 308; Hawk. P. C. 2, 25, 16. [b] 22 & 23 Vic. c. 17.

IN SCOTLAND.

[1] The proceeding by the public prosecutor before the sheriff resembles the proceeding before the grand jury, being *ex parte* and secret. But it is more expeditiously performed, for the procurator-fiscal proceeds at once, and goes on with the examinations till they are completed; whereas the grand jury can only meet at stated intervals.

959. *Criminal information.*—There are two modes only of putting the accused on his trial without an indictment being found by a grand jury, viz., in misdemeanours where a criminal information has been filed by the Attorney-General or Master of the Crown Office.[a] The Attorney-General can file a criminal information at discretion,[a] but the Master of the Crown Office cannot do so unless leave of the Court of Queen's Bench has been asked and given in open court.

Coroner's inquisition.—The other course is where a coroner's inquisition finds a person guilty of murder or manslaughter.[1]

MATTERS PRECEDING TRIAL.

960. *Forcing on trial.*—A person committed for trial has a limited power to force on his trial, which depends partly on the sittings of the next sessions or assizes, which are held only at fixed intervals.[b 2]

961. *Form of indictment, etc.*—The indictment charging a prisoner is of this form: "The jurors on their oath present that A B, one shirt of the goods of C D, feloniously did steal, against the peace of our lady the Queen."[3] Liberal powers of amendment are now given to

[a] 4 Bl. Com. 312. [b] 31 Ch. II. c. 2, § 7.

IN SCOTLAND.

[1] There is no coroner, but the procurator-fiscal makes an *ex parte* inquiry into any case of suspicious death.

[2] A greater power exists in the prisoner to force on his trial, and a definite period can be fixed by him, irrespective of the sittings of courts. Stat. 1701, c. 6; 2 Hume, 100; Alis. Pract. 182. This is called running his letters. He can take out letters of intimation against the person on whose application he was incarcerated and against the Lord Advocate. These letters require the Lord Advocate, etc., to execute an indictment against the prisoner within sixty days from the service of the letters, and to bring the trial to a conclusion within forty days thereafter, failing which, the prisoner is entitled to be discharged. He may, however, be tried anew by the Lord Advocate on criminal letters, within forty days. If the time thus fixed does not coincide with the usual time of circuit, the prisoners, and all the witnesses, must be brought up from any part of the country to the Justiciary Court in Edinburgh for trial.

[3] The form of indictment is thus—"A B, you are indicted, whereas theft is a crime, yet true it is you are guilty of the same, in so far as, etc., and which being found proven, you ought to be punished to deter others." Criminal letters are in the name of the Queen. Alis. Pract. 215.

the court by Lord Campbell's Act.[a 1] The time at which the crime was committed need not be proved as stated in the indictment, unless it is of the essence of the offence.[b] There is no rule of practice that the offence must be proved to have been committed within three months from the time so stated, unless the time is material.[2]

962. *Prisoner's copy of the indictment, etc.*—It is not necessary for the prosecutor to serve the prisoner or defendant with any copy of the indictment, or information before trial, except in treason.[3] In all cases, however, the court in its discretion may direct the indictment to be read over slowly, in order that it may be taken down.[c] In misdemeanours, moreover, the defendant is entitled to a copy of the record, as a matter of right.[d 4] And the prisoner can obtain a copy of any depositions that may have been taken before a magistrate at 1½d. per folio of ninety words; and if he is a pauper, without such fee; but as in many cases no examination takes place before a magistrate, this privilege is not universal.

963. *Notice to prisoner of witnesses against him.*—The prisoner is not entitled, before the trial, to be served with a list of the witnesses proposed to be called against him, with their names and addresses, except in treason; but if there has been an examination before a magistrate, he can generally find out this from the depositions.[5]

[a] 14 & 15 Vic. c. 100.
[b] *Ibid.*
[c] Parry's Case, 7 C. & P. 836.
[d] 2 Russ. by Greaves, 812.

IN SCOTLAND.

[1] The court has no power to amend the indictment. 2 Hume, 157, 280; *Henry* v. *Young*, Arkl. 105. But it treats clerical and trifling errors as immaterial.

[2] *Contra;* there is an artificial rule which restricts the proof to this latitude in most cases. 2 Hume, 221; Alis. Pract. 253.

[3] *Contra;* in all cases fifteen days before trial the prisoner is entitled to be served with a full and correct copy of the indictment or criminal letters against him. 2 Hume, 243; Alis. Pract. 312.

[4] The precognitions being private, a copy cannot be obtained by the prisoner; but his own agent may afterwards precognosce the witnesses, and generally does so.

[5] *Contra;* in all cases the prisoner is entitled to be served with a list of the witnesses proposed to be called against him, and also of the jury, fifteen days before trial. 9 Geo. IV., c. 29, § 11; 2 Hume, 370; Alis. Pract. 312. All objections to these executions (copies of witnesses, etc.) on the ground of error or irregularity, must be made before the jury are sworn.

Nor, on the other hand, is the prisoner bound to give the prosecutor notice and a list of the witnesses to be called on his part.[1]

964. *Notice of chattels, etc., to be produced.*—So the prisoner is not entitled to notice of the documentary or other evidence to be given against him, or to have chattels, etc., used in evidence deposited with the clerk of assize for inspection. Each witness produces what chattels he can identify, and the prosecutor in general takes charge of these.[2]

THE TRIAL BY PETIT JURY.

965. *The trial.*—In cases of misdemeanour the trial may sometimes take place though the defendant is not present.[3] The trial must in general take place in the county where the crime was committed, but since 1856 the Court of Queen's Bench can now order any trial to take place in the Central Criminal Court, London.[a 4] At the trial the first step is to arraign the prisoner at the bar, and to ask him if he is "guilty" or "not guilty;" if he pleads not guilty, the trial proceeds.[5]

[a] 19 Vic. c. 16. See *ante*, § 940.

IN SCOTLAND.

[1] *Contra;* a pannel is bound, twenty-four hours before the trial, to give to the prosecutor a list of the witnesses he is to call; but this rule is not always enforced. See *R.* v. *Harpur*, 1 Brown, 441.

[2] *Contra;* he is entitled to inspect, two days before trial (2 Hume, 387, 393; Bell's Notes, 278), all chattels that are to be produced in evidence against him; and such chattels must be lodged with the clerk of court before the day of trial. An objection that the productions were not lodged in time, must be made before the jury are sworn. It has been held that where the productions were lodged on the morning of the trial, and the pannel did not ask to examine them, it was too late to object after the jury were sworn. *R.* v. *Kerr*, 29 Sc. Jur. 274. If the pannel has not had a proper opportunity of inspecting the productions, he may move to adjourn the trial. *R.* v. *Wilson*, 29 Sc. Jur. 561. If a witness has kept the articles in his own custody, they seem to be inadmissible as evidence. Bell's Sup. 275.

[3] *Contra;* the trial cannot proceed in any case if the prisoner is not present. 2 Hume, 269.

[4] *Contra;* the Court of Justiciary appoints any place for the trial.

[5] He must object at this stage to the execution of citation, etc. 2 Hume, 278; see *ante*, § 963 *n.*

The Trial by Petit Jury.

966. *Poor prisoner's right to have counsel and attorney.*—The prisoner is not entitled, except in cases of treason, to have counsel assigned to him to defend him gratuitously, but in capital cases the judge generally requests some counsel, without any attorney, so to act; and a counsel never refuses. Yet in a great many cases prisoners, who greatly need such assistance, are undefended by any counsel.[1]

967. *Arraignment.*—The prisoner on being arraigned may both demur and plead. If he do not demur, no interlocutory judgment of *respondeat ouster* or otherwise need be given.[2]

968. The plea of "not guilty" puts in issue the whole charge, and no special pleas on the merits are necessary, nor, in general, need any previous notice of the line of defence, though special, be given to the prosecuting counsel.[3]

969. *Jury.*—The jury which tries the prisoner consists of twelve men;[a] and their verdict must be unanimous.[4] The prisoner is not entitled before trial to be served with a list of the jurors from whom the twelve are to be selected.[5] He can, however, challenge peremptorily (*i. e.* without giving any reason) thirty-five jurors in treason and twenty in felony, but none in misdemeanours.[6] Yet

[a] 2 Bl. Com. 719; 2 Hale, 161.

IN SCOTLAND.

[1] *Contra;* every prisoner, however poor, is entitled by statute 1587, c. 91, to have a counsel to defend him. If the prisoner has not previously applied for counsel, the court will, as a matter of course, assign them to him as soon as the diet is called. If no other counsel are present, the sheriff of the county, who is a counsel generally in actual practice, and who must give his attendance at circuit, is named by the court to defend.

[2] *Contra;* there must always be an interlocutor of relevancy whether an objection is raised or not. 2 Hume, 301; Bell's Sup. 234; see Paterson, 1 Broun, 629; Black, Arkl. 497.

[3] *Contra;* a notice of the line of defence, if special, must be given a day before the trial. 20 Geo. II., c. 43, § 41; 2 Hume, 300-1; 398-9. Yet the regulation is seldom enforced in practice against a prisoner. But see *R.* v. *Monaghan*, 2 Broun, 131; *R.* v. *M'Lellan*, 1 Broun, 441.

[4] *Contra;* the jury consists of fifteen. 2 Hume, 308; and the verdict need not be unanimous. A majority suffices. See *post*, § 984.

[5] *Contra;* fifteen days before trial a list of the jury must be served upon the prisoner. See *ante*, § 963.

[6] He can challenge five jurors only without assigning any reason; but he can do so in all cases. 6 Geo. IV., c. 22.

the Crown may challenge peremptorily until all the panel is gone through.[a] If a prisoner wishes to have a special jury, he may make that a ground of application to remove the indictment by *certiorari* into the Queen's Bench.

Jury de medietate linguæ.—If the accused who is charged with felony or misdemeanour be an alien, he is entitled to have a jury consisting half of foreigners, if so many are found in the place, hence called a jury *de medietate linguæ.*[b] [1]

970. *Giving statement of prisoner in evidence.*—The statement made by the prisoner before the magistrate, if signed by the magistrate, is admissible in evidence without further proof.[c] [2]

971. If the statement amount to a confession or admission of guilt, and has not been obtained by threats or inducement,[3] it may satisfy the jury without any corroborative proof, though the judge generally directs the jury that some corroboration is required.[d] [4]

972. It is not essential, though proper, that the prisoner's statement should be taken down in writing; but before parol evidence is allowed of a statement not so taken down, it must be proved (generally by the magistrate's clerk), that no statement was taken down in writing.[e] [5] Whether and how far parol evidence will be received of things stated by the prisoner but not taken down by the

[a] See *Mansel* v. *The Queen*, 2 Dearsl. & B.
[b] 4 Bl. Com. 352.
[c] 11 & 12 Vic. c. 42, § 18.
[d] Falkner's case, Russ & Ry. 481; Id. 508; Id. 509; but see 2 Russ. by Greaves, 824.
[e] 2 Russ. Crimes by Greaves, 876; 1 Leach, 310.

IN SCOTLAND.

[1] *Contra;* this privilege of foreigners is unknown. *R.* v. *Itansen*, 30 Sc. Jur. 309. But a landed man has a privilege to have the majority of the jury landed men like himself. A landed man is a proprietor infeft in lands. Alis. Pract. 386.

[2] *Contra;* two witnesses must prove they saw the declaration signed by the prisoner, one of whom is generally the magistrate or sheriff, and the proper person to prove it is the magistrate himself, and not one of the subordinate officials. *R.* v. *M'Gavin*, Arkl. 70.

[3] The law as to inducements held out to the prisoner to confess seems the same. *R.* v. *Mahler*, 29 Sc. Jur. 562.

[4] Corroboration is considered indispensable to a confession of the prisoner, and the judge so directs the jury. 2 Hume, 324; Bell's Sup. 239.

[5] The same. 2 Hume, 332; Alis. Pract. 576.

magistrate, is not clearly settled.[a 1] But if the prisoner decline to sign the statement, parol evidence will be admitted, and the witness (if the magistrate's clerk) may use the writing to refresh his memory.[b] Where a prisoner has made a confession or admission to a third party not before the magistrate, it may be proved, and is evidence against him at the trial, and it is for the jury to say whether any corroborative evidence is necessary[2] to satisfy them.[c]

973. *Accomplice's evidence.*—Where an accomplice has given evidence against his companions, it is a mere matter of discretion with the prosecutor whether to indict the former afterwards, and the judge has no power to quash such indictment if prosecuted.[d 3] Though, strictly speaking, the jury may act on the accomplice's evidence without any corroboration, it is in practice the settled rule for the judge to direct them not to do so.[e 4]

974. *Infant a witness.*—A witness, though an infant of tender years, is admissible if he or she understands the nature of an oath; but a child's evidence is not admissible, any more than that of an adult, without an oath.[f 5]

975. *Objection to witness, etc.*—A witness cannot be objected to by a prisoner on the ground that no notice was given before the trial that such witness would be called;[6] nor can chattels, writings, etc., produced be objected to on the same ground.[7]

[a] 2 Russ. on Crimes by Greaves, 878.
[b] Pressley's case, 6 C. & P. 183; Bond's case, 1 Den. C. C. 517.
[c] 1 Leach, 311; Russ. & Ry. 481, 508; but see 2 Russ. on Crimes by Greaves, 824, 826.
[d] 2 Russ. by Greaves, 958.
[e] *R.* v. *Barnard*, 1 C. & P. 88; *R.* v. *Wilkes*, 7 C. & P. 273.
[f] 1 Phill. Evid. 5 (9th ed.) See also *post*, part vi. "Evidence."

IN SCOTLAND.

[1] The same. 2 Hume, 332; Alis. Pract. 576.

[2] The judge directs an acquittal if there is no corroborative evidence. 2 Hume, 333; Alis. Pract. 582.

[3] *Contra;* the court will quash the indictment, and the witness is so informed before his examination (Alis. Pract. 453; 2 Hume, 367; Bell's Notes, 261), but this is not so if a private prosecutor calls the witness.

[4] There must be corroboration of the evidence of a *socius criminus* by another witness, and something more. 2 Hume, 382; Alis. Pract. 551.

[5] *Contra;* the evidence, if the child is under twelve, is admissible without an oath. 2 Hume, 341; Bell's Sup. 246.

[6] *Contra;* notice must have been given. 9 Geo. IV. c. 29, § 11; 2 Hume, 370; see *ante*, § 963 *n.*

[7] *Contra.* 2 Hume, 387; see *ante*, § 964 *n.*

976. *Compelling witness's attendance.*—If a witness is likely not to appear at the trial, he cannot, as a matter of course, be arrested and kept in prison, unless he give bail, until the trial;[a] [1] but where he has been subpœnaed before a magistrate, and has refused to attend, or after attending, has refused to enter into his recognisance to appear at the trial, he may be arrested. In other cases he can only be punished after he has failed to attend, and if the trial is postponed on that or another ground, he may then be arrested and kept in prison till the trial takes place at such postponed date.

977. *Order of proceedings at a trial.*—The order of procedure at an ordinary criminal trial is as follows:—

The prosecutor's leading counsel, at the outset, addresses the jury on the whole case, stating the facts at length, telling the jury that he is instructed they will be proved by the witnesses, and, therefore, necessarily assuming them for the occasion as true, in order to serve as a foundation for his inferences and comments.

He then calls his witnesses and examines them, the opposite counsel cross-examining each, after the examination in chief has concluded. The junior or next junior counsel for the prosecution examines the first witness, and then his senior the next, and so on alternately.

The prisoner's counsel then addresses the jury on the whole case, attacking the evidence of the prosecution, and entering fully into the facts and views of the prisoner, and assuming, in like manner, the facts which his witnesses are afterwards to prove; after which he calls his witnesses, if any, who are cross-examined by the opposite counsel in like manner.

If the prisoner's counsel calls no witnesses, the prosecutor's counsel cannot insist on the reply, except where he is the Attorney-

[a] *Evans* v. *Rees*, 12 A. & E. 55.

IN SCOTLAND.

[1] *Contra;* even without waiting to see if the witness can attend, the court, on being satisfied by evidence on oath that the witness does not intend to attend, will, in the first instance, grant a warrant to apprehend such witness; and this may be done at the instance of the prisoner, as well as of the prosecutor. Alis. Prac. 398. If the applicant has acted maliciously in thus procuring the witness's incarceration, he is liable to an action of damages. 2 Hume, 375. If the witness cannot give bail, he may be kept in prison at the prosecutor's expense till the trial. 2 Hume, 375.

General, or the representative of the Attorney-General, prosecuting for the Crown.[a]

If the prisoner calls witnesses, the prosecutor's counsel then replies on the whole case, and thus has the last word.[1] But if the prisoner call witnesses to character only, the prosecutor seldom insists on his right of reply.

There is a slight variation in the above order in cases of trial for treason.

978. If a point of law arises during the evidence which requires to be argued, the senior counsel raising the objection is first heard, then his junior, then the senior and junior on the opposite side, after which the senior counsel objecting replies.[2]

979. *Swearing witness.*—The witness is sworn by the usher or inferior officer, by taking the New Testament in his right hand (unless he is a Jew, etc.), and kissing the book after the words of the oath have been repeated by the officer.[3] The oath is in this form: "The evidence you shall give to the court and jury, touching the matter in question, shall be the truth, the whole truth, and nothing but the truth, so help you God."

[a] 7 C. & P. 676; 1 C. & K. 628; *R.* v. *Alexander*, M. & M. 439, 440.

IN SCOTLAND.

[1] *Contra;* the order of proceedings at a criminal trial is as follows:—The evidence for the Crown is first given without any preliminary speech, then the evidence for the defence, or exculpatory evidence, without any preliminary speech, the opposing counsel cross-examining each witness after the examination in chief; after which the prosecuting counsel addresses the jury on the whole case; and then the counsel for the defence addresses the jury on the whole case, the counsel of the pannel thus always having the last word.

It is also a rule with regard to exculpatory evidence, that the prosecutor cannot, after the exculpatory evidence is concluded, call witnesses to rebut it. The prosecutor must close his evidence before the evidence for the prisoner begins. The prisoner has thus the benefit of learning the whole of the prosecutor's case before he opens his own.

[2] *Contra;* the junior counsel of the objecting party is first heard, then the opposite junior, then the senior objecting, then the opposite senior.

[3] *Contra;* the judge himself administers the oath to the witness, who kisses no book, but stands holding up his right hand, repeating the words after the judge. The oath is as follows:—"I swear by Almighty God, as I shall answer to God at the great day of judgment, that I shall tell the truth, the whole truth, and nothing but the truth, in so far as I know or shall be asked on the present occasion."

980. *The witnesses present in court.*—It is the practice to allow all the other witnesses to be in court while any one is being examined, unless either party object, whereupon the court, as a matter of course, orders the others to be excluded.[1]

981. *Witness's deposition.*—The witness cannot insist on his deposition before the magistrate being cancelled before giving his evidence; on the contrary, he can be cross-examined as to any discrepancies arising between his evidence and the depositions, his attention being first called to such statements. If the witness is since dead, the deposition can be given in evidence on proof of that fact.[2]

982. *How many witnesses required.*—The testimony of one witness is sufficient, if believed, except in treason and perjury, to warrant the conviction of the prisoner.[3]

983. *Discrediting a witness, etc.*—The party calling a witness cannot discredit such witness by giving evidence of bad character, or by contradicting him by evidence of contradictory statements made by such witness at other times. And if in cross-examination the witness deny having made a contradictory statement, evidence cannot be given of such statement. Moreover, where there is an attesting witness to a writing which did not require an attesting witness, such witness, nevertheless, requires to be called. If the handwriting of a document is disputed, it is not competent to give in evidence other documents which are admitted to be in the alleged handwriting, for the purpose of comparing the same. But in trials of civil cases these things can generally be done.[a 4]

[a] C. L. P. Act, 1854, 22-27.

IN SCOTLAND.

[1] *Contra.* 2 Hume, 377; but now witnesses are not absolutely rejected on the ground of having been present in court, it being in the discretion of the court to admit them if the irregularity was unintentional. 3 & 4 Vic. c. 59, § 3.

[2] *Contra;* only where these are on oath, which is seldom the case. Besides, they are *ex parte.* 2 Hume, 381.

[3] *Contra;* the maxim is, that two witnesses are necessary to warrant a conviction, but they need not testify to the same identical facts. 2 Hume, 384; Alis. Pract. 551.

[4] The rule is the same in both civil and criminal cases, as to which see *post,* "Action at law."

The Trial by Petit Jury.

984. *Verdict of jury.*—In all capital cases, the jury must give their verdict in open court, and in presence of the accused.[a 1] The verdict may be general or special, but there is no general verdict except "guilty" and "not guilty," and a verdict of "not proved" would be entered as a verdict of not guilty.[2] In all cases the verdict must be unanimous.[3]

985. *Dying declarations.*—Where, in cases of homicide, the injured party, when in a dying state, makes a statement as to the circumstances of the injury, this dying declaration may be given in evidence at the trial.[b] The party injured must at the time believe himself to be dying.[c 4] Such evidence is, however, not received except in cases of homicide.[d 5] The declaration need not be on oath in presence of a magistrate, nor in writing.

986. *Hearsay evidence of dead witness.*—Where a witness dies before the trial, but is not the party dying from homicide, as stated in the last paragraph, no hearsay evidence is admitted of anything he may have said as to the subject-matter of the offence; for to do so would be to admit evidence given not on oath, and when the prisoner was not present and capable of cross-examining the witness.[6]

[a] Hawk. Pl. Cr. 2, 47, 2.
[b] Mead's case, 2 B. & C. 600; Hutchison's case, 2 B. & C. 608.
[c] Bonner's case, 6 C. & P. 386; Woodcock's case, 1 Leach, 503; Howell's case, 2 C. & K. 689; 1 Den. C. C. R. 1.
[d] 2 B. & C. 600, *et seq.*

IN SCOTLAND.

[1] In all cases without exception. 2 Hume, 428.

[2] *Contra;* there is an intermediate verdict of "not proven," which is substantially a verdict of "not guilty," and is *res judicata* barring another trial. 2 Hume, 439.

[3] *Contra;* the verdict of a majority of the jury suffices, which, since the jury consists of fifteen, cannot be less than that of eight persons.

[4] *Contra;* it is not necessary that a party injured, whose declaration or deposition is to be given in evidence after his death, should have believed himself at the time to be in a dying state. Bell's case, 13 S. D. 1179; Bell's notes, 292; *R.* v. *Brodie*, Arkl. 45.

[5] *Contra;* it is received in all cases of violence. 2 Hume, 407; Bell's notes, 291; Alis. Pract. 511; Brodie's case, Arkley, 45.

[6] *Contra;* if a witness dies before trial, evidence is admitted of what he said, whether in view of death or not, about the subject matter, provided such witness had no interest at the time he spoke; and this rule is general in all cases, both civil and criminal, though the statements of the deceased witness may, in many cases, amount to little in point of weight. *Watson*, 15 S. D. 753; *R.* v. *Stewart*, 27 Sc. Jur. 408; Bell's Sup. 291; *R.* v. *Reid*, 31 Sc. Jur. 176; *R.* v. *Madeleine Smith*, 29 Sc. Jur. 564.

987. *Rape.*—In indictments for rape the prosecuting counsel may give in evidence the fact that the female made a complaint soon after, but cannot give in evidence the details of the complaint. [a] [1] Yet the counsel for the defence may, if he chooses, elicit the details in cross-examination. [b]

In proving the offence of rape, it is not necessary to establish that the prosecutrix actively resisted the perpetration of the offence; it is enough that the offence was committed *without* her consent. [c] [2]

988. It is a *presumptio juris et de jure* that a boy under fourteen cannot commit a rape, that is to say, no evidence is admissible to show that he actually committed the offence. [d] [3]

989. *Attempt to commit felony or misdemeanour.*—If, on the trial of a person for felony or misdemeanour, it appear to the jury that the defendant did not complete the offence, but was guilty only of an attempt to commit the same, the prisoner is not entitled to be acquitted, but the jury may return a verdict that he is guilty of an attempt to commit the same, and thereon he may be punished as if he had been guilty, on an indictment for an attempt to commit the felony or misdemeanour. [e] An attempt to commit a felony is in many cases a misdemeanour, and so is an attempt to commit a misdemeanour, the attempt being clearly proved. [f] [4]

[a] Clarke's case, 2 Stark, N. P. 242.
[b] *R.* v. *Walker*, 2 M. & R. 212.
[c] *R.* v. *Fletcher*, 22d Jan. 1859.
[d] 1 Hale, P. C. 630.
[e] 14 & 15 Vic. c. 100, § 9, 12.
[f] Russ. on Crimes, by Greaves, 46.

IN SCOTLAND.

[1] *Contra;* the details of a rape, as stated by the female, may be given in evidence if of recent occurrence. 1 Hume, 309; Alis. Pr. 217; *Ibid*, 514.

[2] *Contra;* some active resistance is necessary to be proved. See *R.* v. *Sweenie*, 21st June 1858; 31 Sc. Jur. 24.

[3] *Contra;* evidence is admissible to show that the boy actually committed the offence, and if proved, he is punishable like other persons. Fulton, 2 Swint. 564.

[4] An attempt to commit the *graviora delicta*, as murder, rape, fire-raising, etc., is a relevant article of dittay (indictable). But an attempt to commit a minor crime, as, for example, theft, is not indictable. *R.* v. *Ure*, 30 Sc. Jur. 310. But there are many crimes called innominate offences (*i. e.*, which have no distinct name or definition), which are punishable as crimes, though no statute has ever declared them to be so, the Court of Justiciary assuming an inherent power at common law to punish new forms of crime as they arise. 1 Hume, 358, 436, 496; Bell's Sup. 174; Alison, Pract. 624.

CHAPTER II.

THE CHURCH.

991. *Convocation.*—There is a kind of ecclesiastical Parliament, consisting of representatives of the various orders of the clergy, called the Convocation, which occasionally meets, but no practical power is exercised by it.[a] [1] All the lower orders of clergy have representatives in it, who share with the dignitaries of the church the right of making canons, provided these canons keep within the law. Each province has a Convocation of its own. In York the Convocation consists of one house only; but in Canterbury there is an upper house consisting of the bishops and archbishops, and a lower house consisting of deans and archdeacons, the proctors for the chapters, and the proctors for the parochial clergy, the latter in each diocese sending two proctors. As a license is required from the Sovereign to enable the Convocation to make canons, or even to confer for that

[a] 1 Bl. Com. 279; 3 Hallam, 236, *et seq.* (3d ed.)

IN SCOTLAND.

[1] The General Assembly meets every year in the middle of May, and sits for ten days, to entertain appeals and discuss general matters affecting the church. Hill's Practice of Ch. Judicatories. The General Assembly of the Established Church is the Supreme Ecclesiastical Court for the discipline of the clergy. It consists of ministers and elders sent as representatives from all the Presbyteries, Royal Burghs, and Universities. Presbyteries containing twelve ministerial charges, send two ministers and one ruling elder; larger Presbyteries send more members in proportion. A Lord High Commissioner is appointed by the Crown to attend the Assembly, but takes no share in the business, though he sits in the house while the business goes on. The Assembly elects annually a moderator. The Assembly, in a *quasi* legislative character, can make acts of assembly (canons), which are generally suggested from the inferior courts in the shape of "overtures." As a court of discipline, it entertains appeals from Synods, the Synods entertaining appeals from Presbyteries, and Presbyteries from Kirk-Sessions, which last are parochial spiritual courts. The powers of the General Assembly are treated in *E. Kinnoull* v. *Presb. of Auchterarder*, M'L. & Rob. 220; *Ferguson* v. *Kinnoull*, 1 Bell's Ap. 662; and other cases down to *Lockhart* v. *Presb. of Deer*, 13 D. B. M. 1296.

purpose, which is always withheld except for purposes of form, no business of that kind is ever done.

992. *Orders of clergy.*—The clergy consist of three orders, bishops (including archbishops), priests, and deacons. There are also different ranks and degrees, viz., archbishops, bishops, archdeacons, deans, parsons and vicars, and curates.[1]

993. *Parsons and vicars.*—To become a parson or vicar there are four requisites—1, Holy orders; 2, Presentation; 3, Institution; 4, Induction. When the bishop is patron, the presentation and institution are one act called the collation.[2] The presentee may be objected to on various grounds by the bishop, who must be satisfied as to four things, viz., age, behaviour, learning, and holy orders; but the parishioners have no voice in his appointment, except so far as the bishop may consult them.[3] The bishop is entitled to a reasonable time, which is twenty-eight days, to examine the clerk presented to him.[a] If the bishop refuse to admit for want of learning, no temporal court can review his judgment,[b] though there is an appeal to the archbishop and Privy Council if the bishop refuse. The dean of the Arches or other court of appeal, in such circumstances, entertains an appeal called a *duplex querela.*

994. A vicar is a person holding a living under the parson.[c] There is in some places an endowed vicarage, and the vicar has part of the tithes.

Curates.—A curate is a clerk not instituted, but exercising the spiritual office under the rector or vicar. He is appointed by the

[a] *Gorham* v. *Bp. of Exeter*, 2 Robert. Eccl. R. 1.

[b] *R.* v. *Archbishop of Canterbury*, 15 East. 117.

[c] 4 Burn, Eccl. L. 9.

IN SCOTLAND.

[1] *Contra;* all the ministers of the Established Church are equal in rank; an assistant and successor is often appointed to aged ministers. Ministers are all bound to contribute to a widows' fund, for which there are three rates varying in amount. 54 Geo. III. c. 159.

[2] The stages of a minister's appointment are,—1. Licentiate or probationer; 2. Presentation; 3. Ordination and induction.

[3] The parishioners are entitled to state objections to the presentee, and the presentee is appointed to preach to the parishioners for the purpose of enabling them to object. But the Presbytery review the objections and can disregard them if they think them frivolous and unreasonable. 6 & 7 Vic. c. 61; see also *Kinnoull* v. *P. Auchterarder*, M'L. & Rob. 220.

incumbent, and approved or licensed by the bishop. There are some curacies perpetual, in which case the curate can only be deprived by the bishop.

995. *Church discipline.*—The sole courts for the discipline of the clergy were formerly the Archdeacon's Court, from which there was an appeal to the Consistory (or Bishop's) Court, thence to the Court of Arches (or Archbishop's Court), thence to the Privy Council. Some places were subject to the jurisdiction only of the Court of Peculiars, thence of the Arches Court and Privy Council.[1] But now proceedings against the clergy for immoral conduct, false doctrine, and other offences, are regulated by the Church Discipline Act.[a] The bishop, in the first instance, appoints commissioners to hear the charge, then there is an appeal to the bishop and his assessors, thence to the Court of Appeal of the province, and thence to the Judicial Committee of the Privy Council.[b] If the bishop or archbishop fail to act, the Court of Queen's Bench controls them by the prerogative writ of mandamus.

996. *Jurisdiction as to wills and marriage.*—The jurisdiction of the Ecclesiastical Courts, in matters concerning wills, succession, marriage, and divorce, is, since 1857, abolished, and transferred to the Court of Probate and Court of Divorce respectively.[c 2]

997. *Advowsons.*—It is simony for a patron to give a presentation to a person for gift, money, or reward, and the offence causes a forfeiture of two years' value of the benefice. Advowsons may, however, be bought and sold, if there is no vacancy and no corrupt contract or design connected with the sale as to the next presentation, and though the incumbent is known to be at the point of death; otherwise it is simony to purchase a presentation, the living being vacant.[3] But resignation bonds taken by the patron from the pre-

[a] 3 & 4 Vic. c. 68. [b] Cripps, Laws of the Clergy, 31.
[c] 20 & 21 Vic. c. 77 & 87.

IN SCOTLAND.

[1] The Kirk-Session is a court in each parish from which there is an appeal to the Presbytery, thence to the Synod, and thence to the General Assembly which is supreme. A clergyman is first proceeded against before his Presbytery.

[2] This jurisdiction belongs, as to wills, etc., to the commissaries, now the sheriffs; and as to marriage, etc., to the Court of Session.

[3] So the right of patronage can be bought and sold, though it is seldom sold apart from the land with which the right is connected.

sentee to resign the benefice at a future period in favour of some one named, or certain persons to be named by the patron, are frequent and not illegal.[a] [1] To make these bonds legal, the nominee must be either by blood or marriage an uncle, son, grandson, brother, nephew, or grandnephew of the patron; the writing must be deposited for public inspection with the registrar of the diocese; and the presentation must take place within six months after the registration.[b] Roman Catholics cannot exercise the right of presenting to a benefice.[c]

998. *Pluralities.*—Two benefices cannot be held by the same person, except the churches are within three miles' distance, and the value of one is under £100 per annum,[d] or unless the Ecclesiastical Commissioners have united them;[e] but there are many exceptions in the case of persons having cathedral preferments, heads of colleges, etc., stated in recent statutes.[2]

THE PARISH CHURCH, ETC.

999. *Freehold of the church.*—The freehold of the church and churchyard is in the parson,[f] [3] and he is entitled to keep the key.[g] [4] But, strictly speaking, he has not the fee-simple, but only a freehold interest for life, the fee being in abeyance.

1000. *Erection of new churches.*—No person can erect a new

[a] 2 Bro. P. C. 211; *Bishop of London* v. *Ffyttche*, 1 East. 487; *Fletcher* v. *Lord Sondes*, 5 B. & Ald. 835; 3 Bing. 501; 9 Geo. IV. c. 24.
[b] 9 Geo. IV. c. 24.
[c] Cripps, 498.
[d] 1 & 2 Vic. c. 106; 13 & 14 Vic. c. 98.
[e] 18 & 19 Vic. c. 127.
[f] Co. Lit. 341 *b*; Prideaux, 130; *Walter* v. *Montague*, 1 Curt. 253.
[g] *Lee* v. *Mathews*, 3 Hagg. 173.

IN SCOTLAND.

[1] These bonds and agreements are not known. See Dunlop's Par. Law, § 172, *et seq.*, 3d ed.

[2] There are no pluralists, but professors in certain circumstances can be ministers. Dunlop's Par. Law, 268, 310, 3d ed.

[3] The fee of the church and churchyard is in the heritors collectively.

[4] *Contra;* the beadle, as servant of the heritors, keeps the keys of the church; but see *Kirk-Session of St. Andrews* v. *Mag. of Edin.* 13 S. D. 391; see also *post*, § 1005 *n.*

public chapel, forming part of the Established Church of England, without first obtaining the consent of the bishop, patron, and incumbent, and providing against any loss to the incumbent.[a] Various statutes have authorised commissioners to build new churches in populous parishes, and the relations between these and the mother church are defined.[b] [1]

1001. *Churchwardens.*—The guardians or keepers of the parish church and the representatives of the parish for most purposes are the churchwardens, generally two in number, appointed yearly, sometimes by the minister, sometimes by the parish, and sometimes by both. In general, any resident householder or occupier of a house in the parish can be compelled to serve the office of churchwarden;[2] but dissenters, if chosen, may execute it by deputy, unless the Ecclesiastical Court exempt them altogether.[c]

1002. *Church rates; repair of church.*—The fabric of the parish church consists of four parts—the tower or belfry, the chancel, the nave or body of the church, and the aisles. There is a difference as to the burden of repairing these parts. The expense of keeping the church (except the chancel and churchyard) in repair falls on the parishioners[3] or actual residents in the parish. But this obligation can be got rid of in this way—When the churchwardens call a vestry or meeting of the parishioners, these are entitled to agree by a majority upon what is a sufficient rate to be levied; and if the majority present resolve that no rate shall be levied, they can only be punished by excommunication of the Ecclesiastical Court, which is an obsolete and futile remedy, or no remedy at all.[d]

[a] *Bliss* v. *Woods*, 3 Hagg. 509.

[b] 58 Geo. III. c. 45; 59 Geo. III. c. 134; 1 & 2 W. IV. c. 38; 5 Geo. IV. c. 103; 1 & 2 Vic. c. 106.

[c] *R.* v. *Hall*, 1 B. & C. 123; 1 W. III. S. 1, c. 18; 31 Geo. III. c. 32, § 7; *Adey* v. *Theobald*, 1 Curt. 447.

[d] *Gosling* v. *Veley*, 4 H. L. Cas. 679.

IN SCOTLAND.

[1] There are similar statutes for Scotland. 5 Geo. IV. c. 90; 4 & 5 W. IV. c. 41; 7 & 8 Vic. c. 44.

[2] *Contra;* there is no such office as that of churchwarden, who seems to have functions intermediate between the elder on the one hand, and the heritors on the other hand.

[3] *Contra;* the expense of repairing the church and churchyard falls on the heritors, *i. e.*, all the owners of land liable in payment of poor rates. *Murdoch* v. *Robertson*, 8 S. D. 587.

1003. The duty of repairing the chancel [1] of the church lies on the parson, in the absence of special custom.[a]

1004. *Things necessary in divine service.*—It is the duty of the churchwardens [2] to take care of and supply all things necessary for the decent celebration of the service of the church.[b] The churchwardens levy a rate for the above purposes, so that the expense falls upon the parish. The things deemed necessary are, a communion table, a credence table, a comely and decent pulpit, a reading-desk, a surplice, a font, an alms-chest with three keys (one for the parson and two for the churchwardens), an alms-basin, a chalice, a bell with a rope, a bier, a Bible of the largest volume, a Common Prayer, a register, a table of degrees of marriage prohibited, a table of the Ten Commandments, and some chosen sentences painted on the walls. Other things which are useful are not necessary in the above sense; for example, an organ is not necessary for an ordinary parish church.

1005. *Parish officers, etc.*—A vestry clerk [3] and parish beadle [3] are two officers generally appointed by the vestry; they are not fixed permanent officers.[c]

1006. The parish clerk,[4] however, appointed by the minister and sometimes, under local custom, by the parishioners, has a freehold

[a] Gibson, Cod. 199. *Westerton*, Moore, Pr. C. C.

[b] Canons, 80, 82, 85, etc. As to what is decent and orderly, see *Liddell* v.

[c] *R.* v. *Croydon*, 5 T. R. 713.

IN SCOTLAND.

[1] *Contra*; there is no distinction between one part of the church and another as to the liability to repair.

[2] *Contra*; the heritors are bound by statute to supply things that are necessary for the communion service; but the necessaries are few. Stat. 1617, c. 6; M. 10,570. They include the expense of communion-forms, tables, cloths, etc. But the expense of furnishing the communion elements, *i. e.*, bread and wine, falls upon the minister, to whom the Court of Teinds generally allocates from £6 to £12, when granting an augmentation. Dunlop, Par. L. 478.

[3] The session-clerk is appointed by the Kirk-Session, subject to variation by contrary usage, and, unless otherwise agreed at his appointment, he is removable at pleasure. Dunlop, Par. L. 71; M. 8017; 5 Br. Sup. 600. But the beadle (who is also generally the bellman and sexton, and is appointed by the heritors, M. 7916, 2 S. D. 194) seems to have a freehold office. Dunlop's Par. Law, 69.

[4] The precentor, or officer who conducts the psalmody, is appointed by the Kirk-Session, subject to variation; M. 8016; M. 7916; but is removable at pleasure. M. 8017.

office, and cannot be removed except for gross misconduct.[a] So the parish sexton,[1] similarly appointed, has a freehold office.

1007. *Church pews.*—All the pews in the parish church, by general law, belong to the parishioners, who are all entitled to a seat.[b] [2] The bishop,[3] in the absence of custom, is entitled to distribute the seats;[c] but individuals may claim a particular pew, either by showing a faculty or proving prescription.[d] A suit called "perturbation of seat"[4] is entertained by the Ecclesiastical Court, where one is disturbed by another claiming his seat.

1008. The right to pews is an appurtenant to the house, and parishioners quitting the parish cease to have the right.[e] [5]

1009. The bishop or churchwardens cannot sell or let the pews, and no custom can legalize such a transaction.[f] [6] There must be an Act of Parliament rendering it competent, and the Church Building Acts expressly authorize the letting of pews in new churches.

1010. *Churchyard.*—The freehold of the churchyard is in the minister, whether he be rector or vicar,[g] [7] but the parishioners have

[a] *R.* v. *Ashton*, Sayer, 159; 7 & 8 Vic. c. 59, § 5.
[b] *Fuller* v. *Lane*, 2 Add. R. 425.
[c] 2 Roll. Abr. 288.
[d] *Tattersall* v. *Knight*, 1 Phil. Eccl. c. 237; 3 Phil. 16.
[e] *Walter* v. *Gunner*, 1 Hagg. R. 314; *Byerley* v. *Windus*, 5 B. & C. 18; *Woollscombe* v. *Duldridge*, 3 Add. R. 6.
[f] *Stevens* v. *Woodhouse*, 1 Hagg. 318.
[g] See *Clifford* v. *Wicks*, 1 B. & Ald. 498, 508; *Rich* v. *Bushnell*, 4 Hagg. 164; Wats. C. L. 391; Cripps, 447.

IN SCOTLAND.

[1] The same. See *supra*.

[2] *Contra*; the right extends only to the heritors as owners. The patron and minister are each entitled to a seat. Each heritor is entitled, in the order of his valuation, to a seat for his family, and to a corresponding share of the rest of the church for his tenants. Dunlop, P. L. 36.

[3] The sheriff, or judge ordinary, is the proper person to appropriate the church seats.

[4] In case of disputes as to church seats, the sheriff has jurisdiction, or a suspension and interdict may be brought in the Court of Session. The general scheme of appropriation can only be carried out by a process of division before the sheriff, and then by appeal to the Court of Session.

[5] So it is a pertinent of the land. Ersk. 2, 6, 11; M. 9644.

[6] The heritors or magistrates in some parishes may, by custom, let church seats for limited purposes, as to provide a fund for repairing the fabric, etc. *Clapperton* v. *Mag. of Edin.* 2 D. B. M. 1385.

[7] It is in the heritors in proportion to their valuation. 5 Br. Sup. 415; *Ure* v. *Ramsay*, 6 S. D. 916; Hailes, 758.

a right to use it for the purpose of divine service and of burial. The duty of repairing and fencing the churchyard falls on the parishioners,[1] who (as to the fencing, in the absence of custom) may be indicted for neglect.[a] The trees of the churchyard belong to the rector or vicar, but he can only fell them to repair the chancel or for some good purpose connected with the church.[b] [2] So the grass belongs to the rector or parson, but he must not pasture cattle there, for that would be a nuisance, or would interfere with the rights of the parishioners.[3]

1011. *Right of burial.*—Every person is of common right entitled to be buried in the churchyard of the parish in which he died.[c] [4] But the parson only can give permission to bury in the church.[d] [5] The minister cannot be compelled by a court of law[e] to read the burial service over the body, but if he refuses, he may be proceeded against in the Ecclesiastical Courts, and suspended for three months, unless the deceased had been unbaptised, or excommunicated, or a suicide.[f] [6]

1012. In populous cities and towns, by statute, the Queen in Council may order burials to be discontinued in certain burial grounds, and substituted places are to be provided by the vestry, who appoint a burial board to manage these arrangements.[g] [7]

[a] Canon 85; Gibs. 194; *R.* v. *Reynell*, 6 East. 315.
[b] Gibs. 208.
[c] *R.* v. *Stewart*, 12 A. & E. 776.
[d] Gibs. 453; Wats. c. 39.
[e] *R.* v. *Taylor*, 7 Davy Mss. 278.
[f] Canon 68; *Titmarsh* v. *Chapman*, 3 Notes of Cas. 370; 3 Curt. 703.
[g] 15 & 16 Vic. c. 85; 16 & 17 Vic. c. 134; 18 & 19 Vic. c. 128.

IN SCOTLAND.

[1] *Contra;* the duty of repairing the churchyard and fencing it is on the heritors. Stat. 1597, c. 232.

[2] The trees in the churchyard belong to the heritors with the like qualification. Hailes, 758; Dunlop's P. L. 84.

[3] So the grass belongs to the minister, but he cannot pasture cattle on it. M. 5148; *Spence* v. *Darling*, Connell's Sup. 95.

[4] The same.

[5] The heritors, it seems, cannot now give permission to bury in the parish church. See *Hamilton* v. *Heritors of Linlithgow*, Connell's Sup. 106; Dunlop, P. L. 65. They have, however, collectively the right of managing the churchyard. *M'Bean* v. *Young*, 31 Sc. Jur. 167.

[6] There being no burial service, no duty of this kind attaches to the minister.

[7] There is also a Burial Act, 18 & 19 Vic. c. 68, *et seq.*

The Church.

1013. *Residence of clergyman.*—The incumbent is not always entitled to a house of residence, but in most cases there is a parsonage house attached to the incumbency; and where there is none, various statutes have been passed for the purpose of providing them.[a 1]

1014. Where there is no house of residence or none fit, the bishop may grant the incumbent a license to reside in some fit house, at the incumbent's own expense.[b 2]

1015. *Non-residence.*—If an incumbent, without a license, absent himself for more than three months consecutively or in the aggregate in any one year, he is liable to forfeit from one-third to three-fourths of the annual value.[c 3] But there are many exemptions from the penalties of non-residence.[d]

1016. *Repair of residence.*—The incumbent is bound, both by common law and statute, to keep the residence in repair, and is liable, both in the ecclesiastical and temporal courts, for dilapidations.[e 4]

1017. The incumbent is not liable to rebuild the residence.[5] But numerous statutes have been passed to provide means enabling

[a] 17 Geo. III. c. 53; 1 & 2 Vic. c. 23; 1 & 2 Vic. c. 106; 19 & 20 Vic. c. 104; 19 & 20 Vic. c. 50.
[b] 1 & 2 Vic. c. 106.
[c] *Ibid.*
[d] 1 & 2 Vic. c. 106.
[e] 13 Eliz. c. 10; 14 Eliz. c. 11; 1 & 2 Vic. c. 106; *North* v. *Barker*, 3 Phill. 309; *Bird* v. *Relph*, 2 A. & E. 773.

IN SCOTLAND.

[1] There is, in all cases, a manse for the minister provided by old statutes, and which the heritors are bound to build; Bell's Pr. § 1165, 6; Dunlop, P. L. 101; except in royal burghs, where there is no landward district attached, in which case a compensation is given. 5 Geo. IV. c. 72, § 2. The manse includes a stable, byre, barn, and garden. Connell, 291; Ersk. 2, 10, 57.

[2] When the minister is entitled to a manse, and has none, he can claim house rent in lieu thereof.

[3] There is no statute on this subject, but the minister requires leave from the Presbytery.

[4] *Contra;* the heritors are bound to repair the manse, and the Presbytery may order whatever is necessary to make it habitable, or if that cannot be done, may order a new manse. *Hamilton* v. *Clason*, 4 S. D. 551; Connell, 278; *Dingwall* v. *Gardiner*, 1 Sh. Ap. 10; *Per* L. Eldon, *Hamilton* v. *Scott*, 1 Dow, 393. When the manse is put in thorough repair, the Presbytery is bound to declare it a free manse, which is seldom done, and if done, is always disputed, and even then the minister is not liable for substantial but only for ordinary repairs. *Ibid;* Dunlop, P. L. 153.

[5] The heritors are liable to rebuild the manse. *Ibid.*

incumbents to raise money to repair or rebuild, under Queen Anne's bounty, etc.[a]

1018. *Glebe.*—There is frequently a portion of land attached to the parsonage or vicarage house called a glebe, but an incumbent is not otherwise entitled, by law or statute, to have a glebe.[1]

1019. *Tithes.*—The fund out of which the maintenance of the whole ecclesiastical body, exclusive of partial endowments for the benefit of particular corporations only, consists of tithes,[2] *i. e.*, the tenth part of the annual increase of the lands. The parson of every parochial church is of common right entitled to tithes of the lands. But so many exceptions now exist that the general rule may be said to be reversed.[b] Some lands are tithe-free, from having been originally abbey lands,[c] or held by spiritual persons or corporations.[d] Some lands may escape tithe by proving that a real composition was fixed, with consent of the bishop and patron,[e] previous to the statute 13 Eliz. c. 10, or since that statute, if made by a decree of a court in a suit to which the incumbent, the bishop, and patron were parties.[f] So tithe may be escaped by showing that there had been a *modus* or particular custom of paying, in lieu thereof, some compensation; or it may be, by showing a long usage of exemption from tithe altogether, as for thirty years, subject to certain qualifications.[g]

[a] 17 Geo. III. c. 53; 1 & 2 Vic. c. 23; 5 & 6 Vic. c. 26; 19 & 20 Vic. c. 5.
[b] Cripps' Laws of the Clergy, 305.
[c] 31 Hen. VIII. c. 13.
[d] *Wright* v. *Gerrard*, Hob. 309; 2 Rep. 46.
[e] 2 Inst. 490; 13 Rep. 40.
[f] 2 & 3 W. IV. c. 100, § 2.
[g] *Ibid*, c. 100.

IN SCOTLAND.

[1] *Contra*; every minister entitled to a manse, is, by statute, entitled to a glebe, *i. e.*, four acres of arable land; stat. 1572, c. 48; 1663, c. 21; Bell's Pr. § 1172; and in addition to grass-lands for a horse and two cows, or an equivalent. Bell's Pr. § 1175. If he is not entitled to a manse, he has a corresponding compensation. 5 Geo. IV. c. 72, § 2.

[2] So the teinds of the parish form the fund out of which the stipend of the parish minister is payable. The minister, after twenty years from the last decree, can raise an action of augmentation of stipend in the Court of Teinds, of which the judges of the Court of Session are members, and which has also jurisdiction as to the plantation of kirks (fixing the site), and the transportation of kirks (rebuilding on another site), and making or disjoining of parishes. The minister, in a process of augmentation, on showing the insufficiency of his stipend, and satisfying the Court, obtains a decree modifying the stipend, after which a judge makes an allocation of it among the heritors (apportions it). 50 Geo. III. c. 84; 5 Geo. IV. c. 52; Ersk. 1, 5, 21; 2, 10, 46.

The Church.

1020. Until 1836 there was no general statute authorising the tithes of every parish to be commuted by commissioners into a rent charge,[a][1] a process which is compulsory, and is becoming nearly universal. The remedy on such rent charge is by distress on the lands, and not by process against the person.

1021. *Parochial school.*—There is no parochial school established by statute in each parish, supported by rates levied on the owners and occupiers of land, and the schoolmaster having a freehold office.[2]

[a] 6 & 7 W. IV. c. 71, and other statutes down to 10 & 11 Vic. c. 104.

IN SCOTLAND.

[1] There were general statutes of ancient date, viz., stats. 1663, c. 17; 1690, c. 23, which gave the owner of lands the option of purchasing the teinds, subject to a valuation then made, so as to prevent the teinds being levied in kind, and substituting a fixed burden on the land.

[2] *Contra;* the payment of the salary of a parochial schoolmaster, and the maintenance of a school and schoolhouse, are permanent burdens imposed on the owners and tenants in every parish. Act of Privy Council, 1616; Stats. 1633, 51; 1693, 22; 1696, 26; 43 Geo. III. c. 54. The schoolmaster is entitled to a house of four apartments and garden, is appointed for life, and has a salary of from £35 to £70; or, where there are two, from £50 to £80 jointly. The minister and heritors of the parish jointly appoint the schoolmaster. The presbytery had jurisdiction not only over parish but burgh schools (*Presb. of Elgin* v. *Mag. of Elgin*, 33 Sc. Jur. 141), and originally had power to examine, censure, suspend, and deprive the schoolmaster. He is now, upon his appointment, examined by a board nominated by the universities. He requires not, as formerly, to sign the Confession of Faith, but merely a declaration not to teach opinions contrary to Scripture or to the Shorter Catechism; on violation of which duty he may be tried by a commission appointed by the Home Secretary. On complaint of immoral conduct or improper treatment of scholars, he is tried by the sheriff. He is entitled to a retiring allowance. 24 & 25 Vic. c. 107; 43 Geo. III. c. 54. Tenants are liable to pay half the rate charged on the heritors for the salary. The master is bound to teach gratuitously paupers' children, recommended by the heritors. The masters are bound by statute to contribute to a widows' fund. 47 Geo. III. c. 85.

CHAPTER III.

POOR LAWS, AND LAWS AFFECTING JUSTICES OF THE PEACE AND PUBLIC MATTERS.

THE POOR LAWS.

1025. *Poor law administration.*—The first statute which organised a machinery for raising money by rates and relieving the poor was the 43 Eliz. c. 2, which repealed previous imperfect statutes of the same kind.[1] The general administration of the poor law is now under the supervision of the Poor Law Board,[a] which had power to form certain parishes into a union;[b] but the machinery is worked by local officers, called overseers and guardians.[2] The common law was very defective in compelling relations to support each other.[3] By the statute of Elizabeth, which altered the law on the subject, "the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, shall, at their own charges, relieve and maintain every poor person, in that manner and according to that rate as by the justices of the peace, etc., shall be assessed."[c]

[a] 4 & 5 W. IV. c. 76; 10 & 11 Vic. c. 109; 17 & 18 Vic. c. 41, *et seq.*

[b] 4 & 5 W. IV. c. 76, § 26.

[c] 43 Eliz. c. 2, § 7.

IN SCOTLAND.

[1] There were also ancient statutes regulating the right of the poor to beg, but no permanent and efficient machinery was established for the relief of the poor until 1845. 8 & 9 Vic. c. 83.

[2] The Board of Supervision is the central board in Edinburgh, which controls the parochial boards (8 & 9 Vic. c. 83), and may form them into a combination, on request of a parochial board.

[3] *Contra;* the common law of Scotland was not at all defective in providing the means of compelling relatives to support each other, an action of aliment being competent in the above cases; but an action was too tedious a remedy in many cases. See *ante*, § 845 *n.* The stat. 8 & 9 Vic. c. 83, gives a cumulative remedy in some of the cases, for by sect. 80,

The Poor Laws.

1026. The local administration of the poor law in each parish is conducted by the overseers,[1] who are inhabitant householders appointed annually by justices of the peace; the churchwardens being *ex-officio* overseers. But in parishes situated within a union or under a local act, the guardians of the union or parish perform a great part, or the whole, of such duties respectively. The overseers of the parish have the exclusive right to make a rate on the inhabitants; but such rate is not valid until it is allowed by two justices and published on the church doors.[2]

1027. *Rateable value.*—There is only one mode of rating the inhabitants, and that is by rating every occupier of lands, houses, etc., according to the rent for which the same may be reasonably expected to let from year to year free of tenants' rates and taxes, average expense of repairs, insurance, and other expenses necessary to maintain them in a state to command such rent.[a] The rate is entirely a tax on the tenant or person in respect of his occupation.[3] But if a parish adopt the Small Tenements Act, the owners and not the occupiers of houses yielding a rent under £6 will be bound to pay the rate, being in that case assessable to the extent of two-thirds.[b 4]

[a] 6 & 7 W. IV, c. 96; 25 & 26 Vic. c. 103. [b] 13 & 14 Vic. c. 99.

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every husband or father who shall desert or neglect to maintain his wife or children, being able to do so, and every mother, and every putative father of an illegitimate child, after the paternity has been admitted, or otherwise established, who shall neglect to maintain such child, etc., shall be deemed a vagabond, and shall, upon conviction, be punishable by fine or imprisonment.

[1] *Contra;* the local management is conducted by the parochial board, who are not appointed by justices, but elected by the ratepayers; a certain number of the kirk-session, and the magistrates, if any, being *ex-officio* members. 8 & 9 Vic. c. 83, §§ 17, 22.

[2] *Contra;* no consent of justices is required to an assessment. The consent of the Board of Supervision is required, however, to the principle of the assessment, in the first instance, and no alteration can be made without its assent.

[3] *Contra;* the assessment is divided equally between the owner and occupier, but the occupier is bound to pay the whole in the first instance, deducting half from the rent. 3 & 4 Vic. c. 83, § 37; 24 & 25 Vic. c. 37. The mode of arriving at the annual value is substantially the same. 8 & 9 Vic. c. 37, § 37.

[4] There is power to exempt persons on the ground of inability, but no general statute fixing any minimum of rent for ratepayers.

The application of the parochial assessment principle above stated to railway, gas, and other companies, has led to great difficulties, and judges constantly complain that the Legislature has not given specific directions[1] as to the mode of rating these companies, the mileage principle being supposed to be the least objectionable.

In arriving at the annual rateable value, the overseers of each parish ascertained it for themselves, each body of overseers proceeding on their own notions of value to some extent; and though in unions a more uniform mode of rating is enforceable, still there is no universal systematic mode of valuing[2] all the real property of the county for rating purposes.

1028. *Relief.*—Able-bodied paupers are relieved, if destitute, like other persons,[3] except that they must be relieved wholly in the workhouse, together with their families, except in cases of sudden and urgent necessity, accident, sickness, and a few other cases.[a] Half of the relief, when given out of the workhouse, must be given in food, fuel, or articles of necessity; and while a male pauper is so relieved he must be set to work if able. If a pauper is refused relief, or sufficient relief, he may apply to a justice of the peace,[4] who has power to

[a] 4 & 5 W. IV. c. 76, § 52. Consol. Ord. P. L. Board.

IN SCOTLAND.

[1] *Contra;* the Legislature has given specific directions how to assess railway and other companies in the Poor Law Act, 8 & 9 Vic. c. 83, now modified by the Lands Valuation Acts, 17 & 18 Vic. c. 91, 20 & 21 Vic. c. 58, which adopt the mileage principle.

[2] *Contra;* the Commissioners of Supply for each county, and the magistrates of each burgh, annually appoint a valuation-roll of all the lands in the county, and they hear appeals from the valuation of the assessors. The expenses of the valuation are apportioned among the parishes according to aggregate value. The appeal by railway, gas, etc. companies is to the Lord Ordinary. These statutes are called the Lands Valuation Acts. 17 & 18 Vic. c. 91; 20 & 21 Vic. c. 58.

[3] *Contra;* the relief of able-bodied men is absolutely prohibited, and the parochial board has no discretion to relieve them even under the category of occasional poor. 8 & 9 Vic. 83, § 68; *Isdale* v. *Jack*, 2 Macph. 978. The children of such poor also cannot be relieved, for they follow the fate of their father. But an able-bodied female may be relieved if she has children whom she cannot support. *Mackay*, 15 D. B. M. 974.

[4] If the pauper is refused absolutely, he applies to the sheriff; if the relief is insufficient, he applies to the Board of Supervision.

The Poor Laws.

order it to be given in parishes not in union, and in urgent cases where the parish is in union.

1029. *Removal of paupers.*—If the relieving parish is not the parish of settlement, the pauper may be removed;[1] but certain persons are not removable, the chief of these being persons who have resided for three years[2] in the same parish, or in the same union, without a break. In these circumstances the pauper's maintenance is paid by the parish of settlement to the relieving parish, except where the relieving parish is in a union, when the expense is paid out of the common fund of the union. It is the duty of the relieving parish to remove the pauper.[3]

Where the pauper was born in Scotland, and has no English settlement, he may be removed to Scotland.[a 4]

1030. *Settlement.*—Mere residence in a parish for any length of time will not create a settlement[5] in that parish, unless there is superadded the renting of a tenement, payment of taxes, etc.; but mere residence for three years confers the status of irremovability, the effect of which is that the pauper must be supported in the relieving parish at the expense of such parish, or if the relieving parish is in a union, at the expense of the common fund thereof.

A derivative settlement is acquired by a wife or children from the husband or parent.[6]

[a] 8 & 9 Vic. c. 117; 10 & 11 Vic. c. 33; 24 & 25 Vic. c. 76; 25 & 26 Vic. c. 113.

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[1] So paupers may be removed to the parish of their settlement.

[2] Residence for five years is a ground of settlement, and not merely confers a status of irremovability. See n. 5.

[3] *Contra;* it is the duty of the parish of settlement to remove the pauper; and failing its doing so, then the relieving parish may remove at the other's expense. 8 & 9 Vic. c. 83, § 73.

[4] So in like manner paupers born in England may be removed from Scotland by authority of the same statutes.

[5] *Contra;* mere residence, without more, for five years continuously (before 1845 it was three years) confers a settlement, provided the pauper had not during that period had recourse to begging or obtained parochial relief. And he retains a settlement so acquired until there is a break of residence for at least one year. 8 & 9 Vic. c. 83, § 76.

[6] So a derivative settlement is acquired by virtue of marriage and parentage.

1031. *Pauper lunatics.*—Every county must have an asylum, or part of an asylum, for pauper lunatics, and notice must be sent to the visitors of all such lunatics found and chargeable to any parish, and a justice of the peace makes an order to remove them to the county asylum. The expense is paid, in the first instance, by the removing parish, or if the parish is in a union, by the common fund of the union; and if no settlement can be ascertained, then by the county.[a1]

Assessment on means and substance.—Inhabitants of a parish are not now rateable in respect of their stock-in-trade, visible resources, or means and substance, apart from the occupation of real property.[2]

Collections at church-doors.—Church collections have no connection whatever with poor-rates, and the churchwardens were never bound to apply these in aid of the poor-rate.[3]

PARLIAMENT.

1032. *Right of peers to sit in Parliament.*—All English peers are entitled to sit and vote in proceedings in the House of Lords, and to sit on the trial of peers.[4]

[a] 16 & 17 Vic. c. 97; 24 & 25 Vic. c. 55, § 6; 25 & 26 Vic. c. 111.

IN SCOTLAND.

[1] The general provisions of the English Pauper Lunatic Acts are substantially followed. 20 & 21 Vic. c. 71; 25 & 26 Vic. c. 54. Scotland is divided into certain districts for the purpose of providing public lunatic asylums available to paupers.

[2] The statute of 8 & 9 Vic. c. 83 allowed the assessment to be laid partly on means and substance, but this power is now repealed. 24 and 25 Vic. c. 37.

[3] *Contra;* it was long the inveterate practice for persons attending the parish church, prior to 1845, to contribute voluntarily small sums at the church-door, half of which used to be applied by the kirk-session towards the relief of the poor, and the other half to the relief of temporary and urgent cases. This was by a proclamation of the Privy Council of 1693. This is still the only legal application of these collections in all parishes where a compulsory assessment has not been adopted; but where there is such assessment, the kirk-session has now an absolute discretion to apply the whole funds in the same way in which they could formerly apply only half of the funds. 8 & 9 Vic. c. 83, § 54.

[4] *Contra;* Scotch peers as such are not entitled to sit in the House of Lords, or on the trial of peers. They can only elect sixteen of their

Public-Houses.

1033.—*Forty-shilling freeholder's vote.*—A freehold of inheritance of the annual value of 40s. gives a right to vote in the election of Members of Parliament for counties ;[a] though such land be locally situated within a borough, if no vote for the borough is thereby acquired.[b]

1034. *Revising barristers.*—Barristers are appointed specially to revise the list of voters for counties and boroughs,[2] and decide upon claims and objections to vote, thence called revising barristers. Their decision is not final,[3] being reviewable by the Court of Common Pleas, one of the superior courts.

PUBLIC-HOUSES.

1035. *Public-houses, as to license.*—Public-houses, in respect of licenses, are divided into three classes, called ale-houses, beer-houses, and refreshment-houses. A license to sell excisable liquors in an ale-house[4] must be obtained from the justices of the peace, and must be

[a] 8 Hen. VI. c. 7 ; 18 Geo. II. c. 18, § 1 ; 2 W. IV. c. 45, § 24.

[b] As to nature of freehold, etc., see *ante*, §§ 14, 25, 200.

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number to represent them in each Parliament, but not for life. Act of Union, 1707, c. 7, § 23. But many Scotch peers are also English peers. Scottish peers, who are not elected as representatives of the Scotch peerage, and are not also British peers, cannot, like Irish Peers, sit as members of the House of Commons for English or Irish counties or burghs, although their eldest sons may do so. 2 & 3 W. IV. c. 65, § 37.

[1] *Contra ;* no such right exists, though a feu is substantially a freehold. See *ante*, §§ 20, 176 ; 2 & 3 W. IV. c. 65.

[2] The sheriff revises the lists of voters.

[3] So there is an appeal from the sheriff to two Lords Ordinary. 24 & 25 Vic. c. 83.

[4] All kinds of public-houses require a justices' or magistrates' certificate. There are three kinds of certificates. That for inns and hotels authorises the sale of spirits, wines, and beer (an excise license being obtained), but not groceries or uncooked provisions for consumption out of the premises, and the inn is to be open only from 8 A.M. to 11 P.M., except to travellers and guests. The certificate for public-houses properly so called authorises the same sale, but with the addition that no goods or apparel are to be taken for the price or supply of exciseable liquors ; nor are even travellers or guests to be supplied with liquors after the hours of closing. The certificate to grocers and provision-dealers authorises the sale of

renewed annually, and the justices can, at discretion, withhold it. This justices' license must be obtained before an excise license for selling exciseable liquors, by retail, to be drunk on the premises, can be obtained.[a] A beer-house license, which allows only beer, ale, porter, cider, and perry, by retail, to be sold, is obtained, not from justices of the peace, but on producing a certificate of the overseers of the poor, and other preliminaries, from the officers of Excise.[b] It is renewable annually, but does not authorize the sale of wines or spirits, etc., and restrictions are put on the hours of closing, which are 12, 11, or 10 P.M., according to the population of the district.

A license for a refreshment-house is obtained also, not from justices, but from the Excise; but the justices receive notice of the application if foreign wines are to be sold.[c]

1036. *Public-houses on Sunday, etc.*—No licensed victualler or keeper of an ale-house or beer-house shall open or keep open his house for the sale of, or sell beer, wine, spirits, or other fermented or distilled liquor, between the hours of three and five o'clock in the afternoon, nor after eleven in the afternoon, on Sunday, Christmas-day, Good Friday, or any public fast or thanksgiving day, or before four o'clock in the morning of the day following, except to a traveller or to a lodger therein.[d][1] Moreover, the same class of persons cannot open their houses for the sale of wines, spirits, beer, etc., before half-past twelve o'clock on Sunday afternoon (mid-day), or the termination of

[a] 9 Geo. IV. c. 61, §§ 13, 17.
[b] 1 W. IV. c. 64; 3 & 4 Vic. c. 61.
[c] 23 Vic. c. 27; 24 & 25 Vic. c. 91.
[d] 18 & 19 Vic. c. 118.

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spirits, wine, and beer, but not to be consumed on the premises. 25 & 26 Vic. c. 35. All these persons must produce a certificate of character, signed by a justice of the peace, when applying for the justice's certificate, though not on each renewal.

[1] *Contra;* the keepers of public-houses and of grocers' and provision-shops are absolutely prohibited from opening their houses or shops, or selling either liquors or other commodities during the whole of Sunday to any persons whatever. So the keepers of inns and hotels are absolutely prohibited from opening their houses or selling liquors during the whole of Sunday, except for the accommodation of lodgers and travellers. 25 & 26 Vic. c. 35.

the morning divine service, except as refreshment to travellers.[a] It is not an offence punishable by summary conviction for a person to pretend that he is a traveller in order to obtain liquors.[1]

Closing on week-days.—As already stated, beer-houses and refreshment-houses, where wine is sold by retail, are the only houses which must be closed at certain hours on week-days. Public-houses and other refreshment-houses may be open all night.[2] But in the metropolis and in such boroughs as may adopt the Act 27 and 28 Vic. c. 64, no ale-house or refreshment-house is now allowed to be open between 1 o'clock and 4 o'clock A.M.

FISHERIES.

1037. *Fisheries.*—The right to fish all kinds of fish (except whales and sturgeons, which belong to the Crown) in the territorial seas and navigable rivers belongs *prima facie* to the public.[b 3]

But in some localities the public may be excluded by an individual who can show a grant from the Crown as old as Magna Charta, or at least the reign of Henry II., or, what is the same thing, can show exclusive possession of a several fishery for a sufficient length of time to warrant a jury in inferring that there was a grant from the Crown as old as that date. When any individual can show a right to a several

[a] 11 & 12 Vic. c. 49, § 1. [b] Paterson's Fish. L. 14.

IN SCOTLAND.

[1] *Contra;* such person incurs a penalty of £5, and, in default of immediate payment, thirty days' imprisonment. 25 & 26 Vic. c. 35, § 22.

[2] All public-houses, inns, etc., must be closed between 8 A.M. and 11 P.M., so far as selling liquors is concerned, but inns and hotels may sell liquors at any hour to travellers or lodgers. Except as respects selling liquors, there is nothing to require public-houses, and inns and hotels, to be closed during the night.

[3] *Contra;* the public have no right to fish salmon with nets, either in the territorial seas or navigable rivers; for the exclusive right to salmon is *inter regalia, i.e.*, it either now belongs to the Crown or to some subject holding an express grant from the Crown. *Gammell* v. *Commissioners of Woods and Forests;* 3 Macq. H. L. C. 442.

The public, however, have the right to fish for all other floating fish, if the salmon-fishing is not thereby injured; and a charter of the Crown purporting to grant an exclusive right to fish other than salmon would be deemed invalid. Paterson's Fish. L. 167. *Maitland*, 33 Sc. Jur. 102, 106.

fishery in the sea or a navigable river, he can exclude the public from fishing not only salmon but all other fish. Fishing-weirs in a public navigable river are illegal at common law, unless the owner can show a grant[1] of the Crown or prescriptive possession sufficiently long, from which a grant of the Crown as old as Edward III. would be presumed.

There are three kinds of fishery:—A public or common fishery, such as the public have in the sea and navigable rivers; a several or exclusive fishery, such as a riparian owner has in his own part of the river; a common of fishery or a free fishery, such as one has in the water of another person.[a 2]

Salmon Acts.—The fishery of salmon is now regulated to a great extent by statutes,[3] which define a close-time and render illegal certain modes of fishing, such as by fixed nets and engines, even in the owner's own waters. The close-time[4] is from 1st September to 1st February as to nets, and 2d November to 1st February as to angling, subject to a power in the Home Office to vary the season in particular localities on the application of Quarter Sessions.[b] The weekly close-time is from 12 noon Saturday to 6 A.M. Monday.[5] There is no power given by the Act to assess owners of fisheries, so as to create a fund for prosecuting offences;[6] nor has a conservator power to enter the lands of the owner to watch and detect offenders.[7]

[a] Paterson's Fish. L. 45. [b] 24 & 25 Vic. c. 109; 26 Vic. c. 10.

IN SCOTLAND.

[1] *Contra;* there is no exception; and weirs are illegal either at common law, or at least by the joint operation of common law and the older Scotch salmon statutes. Paterson's Fish. L. 176, 182.

[2] These terms are not used, but substantially the same distinctions are known under the general name of fishings or fishery.

[3] The same, and generally there are similar regulations. The old statutes which are still in force are numerous. The recent Act is 24 & 25 Vic. c. 97, and amending Acts, 26 & 27 Vic. c. 50, 27 & 28 Vic. c. 118.

[4] The close-time is nearly the same, beginning rather earlier, but varies in each district, the commissioners having power to vary it.

[5] The weekly close-time is from 6 P.M. Saturday to 6 A.M. Monday. 25 & 26 Vic. c. 97, § 7.

[6] *Contra;* fishery district boards have this power to assess all the owners.

[7] The same as regards the general Act, but under the Tweed Act bailiffs are entitled to enter private grounds. 20 & 21 Vic. c. 148, § 37.

Game Laws.

Poaching fish.—The enactments against poachers of fish apply equally to salmon and all other fish.[a1]

Trout.—Trout and fresh-water fish other than salmon are protected by statute against poachers; but it is immaterial what are the means employed in poaching.[2]

Angling.—A poaching angler, whether of salmon[3] or trout, cannot be apprehended by any person whatever if found poaching in the day-time.[b] His fishing-tackle may, however, be taken by force from him by the owner of the ground,[4] but by no other person, and that only when the angler is found on the spot.[c] A trout-angler, though not liable to apprehension, may be fined by justices.[5] And the poached fish cannot be taken forcibly from the angler by any person whatever.[d6]

An angler of salmon, if not poaching, commits no offence for which he can be punished summarily,[7] by fishing on Sunday.

GAME LAWS.

Game laws.—The laws affecting game are now chiefly statutory.[e8]

[a] Larceny Act, 24 & 25 Vic. c. 96, §§ 24, 25, 103; Paterson's Fish. L. 73.
[b] Paterson's Fish. L. 25.
[c] *Ibid.* 127.
[d] *Ibid.* 130.
[e] Game Act, 1 & 2 W. IV. c. 32; 5 and 6 W. IV. c. 20; 2 & 3 Vic. c. 35; Night Poaching Act, 9 Geo. IV. c. 69; 7 & 8 Vic. c. 29; Larceny Act, 24 & 25 Vic. c. 96; Game Licenses Act, 23 & 24 Vic. c. 90; Hares Act, 11 & 12 Vic. c. 29; Poaching Prevention Act, 25 & 26 Vic. c. 114; Poisoned Grain Acts, 26 & 27 Vic. c. 113; 27 & 28 Vic. c. 115.

IN SCOTLAND.

[1] There are statutes as to salmon, and separate statutes as to trout and other fresh-water fish. Paterson's Fish. L. 208.

[2] *Contra;* statutes prohibit poachers of trout under penalties from using certain modes of fishing, but other modes are not punishable summarily. The illegal modes are double rod fishing, cross line, set lines, otter, burning the water, striking with an instrument, pointing, or by lime. 23 & 24 Vic. c. 45; 8 & 9 Vic. c. 26; Paterson's Fish. L. 212.

[3] *Contra;* an angling poacher of salmon, if caught on the spot, may be apprehended by any person (9 Geo. IV. c. 39, § 11); but an angler of trout cannot he apprehended by any person. Paterson's Fish. L. 226.

[4] *Contra,* as regards trout-fishing; but the same as to salmon. Paterson's Fish. L. 205, 227.

[5] *Contra;* he can neither be apprehended nor fined. Paterson's Fish. L. 226.

[6] *Contra,* as regards salmon; but it is the same as to trout.

[7] *Contra;* he incurs a penalty of £5, besides £2 for every salmon angled. Paterson's Fish. L. 224.

[8] The statutes are 1621, c. 31; 1707, c. 13; 13 Geo. III. c. 54; Day

The laws as between the Crown and the subject, and between landlord and tenant, have been already noticed.[a] No person now requires a qualification[1] by estate to entitle him to kill game. The definition of "game" is not uniform[2] in the various statutes, but in the two chief acts, the Game and Night Poaching Acts, it includes "hares, pheasants, partridges, grouse, heath or moor-game, black-game, and bustards." The close-time for game is, as to partridges, between 1st February and 1st September; pheasants, between 1st February and 1st October; as to black-game, between 10th December and 20th August; grouse, between 10th December and 12th August; bustards, between 1st March and 1st September, exclusive.[3] There is no power in justices of the peace to convict summarily for an illegal trespass in pursuit of wild ducks.[4] It is now an indictable misdemeanour[5] to kill hares or rabbits unlawfully by night in ground used for breeding or keeping them.[b] The owner of the ground has no property in a hare which is killed by a trespasser, unless in the case where the hare was also started[6] on the same owner's ground, in which case the owner may sue the trespasser for it.[c] Game may be taken by force from night poachers if found on the land at the time of poaching.[d][7] The only

[a] See *ante*, §§ 6, 395.
[b] Paterson's Game L. 111.
[c] Paterson's Game L. 17.
[d] *Ibid.* 64.

IN SCOTLAND.

Trespass Act, 2 & 3 W. IV. c. 68; Hares Act, 11 & 12 Vic. c. 30. The English Night Poaching Act, Game Licenses Act, and Poaching Prevention Act, and Poisoned Grain Act, apply equally to Scotland, and also parts of the English Game Act, 1 & 2 W. IV. c. 32.

[1] *Contra;* the party must have a ploughgate of land in Scotland, *i.e.*, 100 acres Scotch (1621, c. 31; Trotter, 8th July 1809, F. C.), or he must have the leave of another party who has.

[2] The definition is also not uniform, but the term in 13 Geo. III. c. 54, includes snipes and quails, though in the other Acts it coincides with the English definition. Paterson's Game L. 161, 168.

[3] The close-time is the same, but there is none as to bustards (if any!).

[4] *Contra;* by 2 & 3 W. IV. c. 68, § 1. Paterson's Game L. 169.

[5] *Contra;* the first and second offences are punishable summarily, but the third and future offences are indictable. Paterson's Game L. 80.

[6] *Contra;* it makes no difference that the hare was started and killed on the same owner's ground, the trespasser having the right to keep the hare at common law in all cases. *Scott*, 18th Jan. 1853. In some cases the statutes authorise the game to be taken by force from poachers. Paterson's Game L. 172.

[7] *Contra;* there is no enactment. *Ibid.* 172.

persons entitled to sell game to the public are licensed dealers,[1] who are licensed by justices of the peace and by the Excise authorities.

It is an offence punishable summarily with a fine of £5 for one to pursue game on the Sunday or Christmas-day,[2] though having the legal right to kill the game.[a]

Though a constable cannot apprehend poachers on the lands where he is found poaching, yet if the poacher is on the highway any constable who reasonably suspects he has been poaching may stop and search, and afterwards summon the poacher before justices.[b][3]

The Poisoned Grain Prohibition Act, 1863, and Poisoned Flesh Prohibition Act, 1864, restrict the right which parties had at common law to kill game by poison.[c][4]

1039. *Highways.*—The Crown has no peculiar rights as to highways. The soil or freehold is vested in the two adjoining owners,[5] each having the right up to the *medium filum*, and as an incident of this right, being entitled to the minerals beneath and the trees and grass on the surface of the highway. Though a highway is called the Queen's highway, this is a mere figure of speech, denoting the equality of right in every member of the public. Locomotives are allowed upon highways and turnpike roads under certain conditions prescribed by statute.[d][6] No person or body of persons have power to make or sanction a tramway[7] on a highway, for such is a nuisance; and no statute has yet authorized such an appropriation of the highway.

The fundamental rule is that every highway, whether footway,

[a] 1 & 2 W. IV. c. 22, § 3.
[b] 25 & 26 Vic. c. 116.
[c] 26 & 27 Vic. c. 113; 27 & 28 Vic. c. 115.
[d] 24 & 25 Vic. c. 70.

IN SCOTLAND.

[1] It is the same since 1860, the stat. 23 & 24 Vic. c. 90, § 13, having imported the provisions of the English Game Act, 1 & 2 W. c. 32, on that subject into Scotland.

[2] *Contra;* no punishment whatever is incurred.

[3] The Poaching Prevention Act applies to Scotland.

[4] These Acts apply to Scotland.

[5] *Contra;* the fee or right of property in the highway is said to belong to the Crown, or to be *res publica*, and incapable of appropriation; but this has been also said to lead to absurdities, and according to *Gallbreath* v. *Armour*, 4 Bell, Ap. 374, the rule is the same as in England.

[6] This Act extends to Scotland.

[7] *Contra;* a statute authorises tramways. 24 & 25 Vic. c. 69.

bridleway, driftway, or carriage way, is repairable by the parish,[1] *i.e.*, by the inhabitants rated to the poor-rate, who may be indicted if the duty is neglected, though sometimes adjoining owners are liable *ratione tenuræ*. Each vestry appoints a surveyor, who makes and collects the rate for these repairs. But as each parish surveyor repaired the highways according to his own notions of repairing, and this led to inequalities, power has been recently given to justices to combine several parishes into one district, and repair the whole in one uniform manner, each parish being represented at the highway board and contributing its proportion of the expenses as before.[a] Powers are given to justices to widen highways to thirty feet, but always on condition of giving compensation to the adjoining owners.

Turnpike roads.—Turnpike roads, which are distinct from general highways,[2] being entirely authorized by statute, are subject to a general Act which is incorporated with each local Act; but when the funds of the trustees are exhausted, the parish is bound to repair these roads so far as the funds raised by the tolls do not suffice.[b]

1040. *Justices of the peace.*—Justices of the peace for counties, but not for boroughs, require a qualification[3] as to property, which is £100

[a] 5 & 6 W. IV. c. 27; 25 & 26 Vic. c. 61. [b] 3 Geo. IV. c. 126; 4 Geo. IV. c. 95; 4 & 5 Vic. c. 59.

IN SCOTLAND.

[1] *Contra;* this principle was never recognised, but early in the 17th century local Acts were passed to regulate most of the leading roads, and for every county road Acts more or less extensive existed, when in 1824 a General Highway Act was passed. 4 Geo. IV. c. 49, amended and consolidated by 1 & 2 W. IV. c. 43. The General Act is incorporated into every Local Act, and over-rides it; but the Local Act is in force otherwise. The Acts give power to raise money and levy tolls. The trustees can widen roads to twenty feet, and take ground for that purpose without payment; and they may widen to forty feet on paying for the surplus beyond twenty feet.

There are certain roads, called *parish roads*, which are not under the General Highway Act, but are maintained on the old system of statute labour, under the management of justices of the peace and commissioners of supply. Bell's Pr. § 663. The labour, or conversion-money to which it is commuted, is supplied by owners or occupiers assessed at £2 yearly, but there is power to exempt those valued under £5 yearly. 8 & 9 Vic. c. 41; *Beckett* v. *Hutcheson*, 2 Macph. 482.

[2] There is no separation into highways and turnpike roads, the general public road being a combination of both kinds.

[3] *Contra;* justices of the peace require no qualification in respect of property.

a year clear of incumbrances from freehold estate, or £300 of reversionary estate. The recovery of penalties and the conviction of offenders in a summary way takes place before justices of the peace, who also have a large jurisdiction in indictable offences.[1] In courts of Quarter Sessions they have power to try many misdemeanours and felonies; but in all felonies and misdemeanours they have jurisdiction at Petty Sessions to entertain a charge and commit the accused, if the evidence is sufficient.

The mode of commencing proceedings before justices is by the complainant laying a complaint or information,[2] on which the justice issues his summons, citing the defendant or accused party; or if a warrant to apprehend is asked for, the information must be on oath.[a]

The warrant to apprehend cannot be executed out of the county of the justices issuing it, unless it is backed[3] by a justice of the county where the execution takes place.

A summons and warrant of a justice is always under the seal[4] as well as the hand of the justice.

All actions brought against any justice of the peace for anything done by him in the execution of his office must be commenced within six[5] months after the act complained of.[b]

[a] 11 & 12 Vic. cc. 43, 44. [b] 11 & 12 Vic. c. 44, § 8.

IN SCOTLAND.

[1] Owing to the ancient establishment of sheriff-courts, most of the summary procedure as to the minor criminal offences takes place before the sheriffs, and the justices take an insignificant part in the general criminal business of the county. Yet their commission is nearly identical in its terms. They have the same jurisdiction as to Excise and Customs, and as to keeping the peace; but trials and judgments were left by the Articles of Union as before. 6 Anne, c. 6, § 2.

[2] The first step is for the complainant or prosecutor to lay a complaint before the justices or sheriff, which is in the form of a petition praying for a warrant to cite or apprehend the respondent. If an oath is required, it is called an oath of verity appended to the complaint, stating that the matter of the complaint is true. 27 & 28 Vic. c. 53.

[3] *Contra;* any constable may execute it in any part of Scotland. *Ibid.* § 8.

[4] *Contra;* no seal is necessary.

[5] Actions must be brought within two months. 27 & 28 Vic. c. 53, § 35.

Vestries, etc.

Vestries.—The legal organ through which a parish speaks[1] and declares its resolution is the vestry, which is composed of all the inhabitants of the parish who are rated to the poor.[a] A vestry is summoned by the churchwardens. The incumbent of the parish has a right to take the chair if present. Each member has from one to six votes, according to his assessment in the rate-books, and any member can demand a poll. The duties of vestries in reference to church-rates, highway-rates, poor-rates, local government, and other improvement Acts, are numerous and important; and through their machinery the self-government of parishes is effected.

Police.—The police constables are divided into parish, burgh, and county police, the two latter being paid by the burgh and county respectively. Burghs may unite with counties in a joint force.[2] The Treasury pays about one-fourth of the whole expenses of the police, except in the city of London.[b]

Local government.—There are various Acts, called Public Health and Local Government Acts,[3] the scheme of which is to allow burghs, districts, and parishes, to constitute themselves local authorities for enforcing sanitary measures, and levying a rate on the owners and occupiers for the expenses of enforcing the Acts.[c]

[a] *White v. Steele*, 12 C. B. N. S. 383.
[b] 2 & 3 Vic. c. 93; 3 & 4 Vic. c. 58; 19 & 20 Vic. c. 69; 22 & 23 Vic. c. 32.
[c] 11 & 12 Vic. c. 63; 21 & 22 Vic. c. 98; 24 & 25 Vic. c. 61; and Amending Acts.

IN SCOTLAND.

[1] *Contra;* vestries are entirely unknown, other machinery in like cases being adopted, such as heritors, sheriffs, local trustees, commissioners. In poor-law matters, the parochial board is elected by the ratepayers, but there is no other body generally representing the parish in other matters affecting self-government.

[2] So burghs may unite with the county in maintaining a police force. 2 & 3 Vic. c. 65; 13 & 14 Vic. c. 33; 25 & 26 Vic. c. 61.

[3] The Police and Improvement (Scotland) Act, 25 & 26 Vic. c. 101, contains a great body of miscellaneous regulations applicable to the local government of burghs and populous places, such as police, sewers, paving of streets, water supply, repairing old tenements, hackney carriages, brokers, vagrants, fires, ventilation, slaughter-houses, public bathing, etc. The enactments being imitations of most of the leading sanitary and police Acts in England. The Act requires to be adopted, but the preceding Acts are still in force where they had been adopted. 13 & 14 Vic. c. 33; 19 & 20 Vic. c. 103; 23 & 24 Vic. c. 96.

Registration of Births, Deaths, and Marriages.

Registration of births, deaths, and marriages.—A machinery was provided in 1836 for enforcing the registration of every birth, marriage, and death in the kingdom.[a][1]

1041. *Parish improvements, etc.*—A parish whose population exceeds 500 may, by a resolution of the vestry and a majority of two-thirds of the votes, purchase lands for parks or playgrounds, and rate the inhabitants,[2] provided half the cost has been raised by private subscription.[b] So a parish, by a majority of two-thirds of the votes, may adopt the Baths and Wash-houses Acts, and the inhabitants may be rated for the purchase and maintenance of public baths and wash-houses.[c] So the Watching and Lighting Act may be adopted,[d] and the Public Libraries Act.[e][3]

Reformatories and industrial schools.—Reformatories were established in 1854 for receiving juvenile convicts.[f] Industrial schools were established for vagrant children in 1857.[g]

Nuisances removal.—The Acts for the removal of nuisances[6] apply to all towns and parishes.[h]

The Smoke Nuisance Acts apply only to the metropolis.[i][7]

Vaccination.—It is compulsory on all parents to have their children vaccinated[8] on receiving notice from the registrar of births, and the

[a] 6 & 7 W. IV. c. 86, *et seq.*
[b] 23 & 24 Vic. c. 30.
[c] 9 & 10 Vic. c. 74; 10 & 11 Vic. c. 61.
[d] 3 & 4 W. IV. c. 90, § 71; 19 & 20 Vic. c. 69.
[e] 18 & 19 Vic. c. 70.
[f] 17 & 18 Vic. c. 86, *et seq.*
[g] 24 & 25 Vic. c. 113.
[h] 18 & 19 Vic. c. 121; 23 & 24 Vic. c. 77.
[i] 16 & 17 Vic. c. 128; 19 & 20 Vic. c. 107.

IN SCOTLAND.

[1] So in 1854 a similar machinery was established. 17 & 18 Vic. c. 30, *et seq.*

[2] There is no similar Act as to parishes; but in populous places many improvements of a sanitary kind may now be effected through the agency of the Police and Improvement Acts. *Ante*, p. 354*d*.

[3] The similar Act applies only to burghs. 17 & 18 Vic. c. 64.

[4] So separate Acts passed for Scotland. 17 & 18 Vic. c. 74; 18 & 19 Vic. c. 87; 20 & 21 Vic. cc. 28, 109.

[5] So separate Acts passed for Scotland in 1861. 24 & 25 Vic. c. 132; 25 & 26 Vic. c. 10.

[6] There is a similar Act for Scotland, 19 & 20 Vic. c. 103; but part of it is affected by the Police Act, 25 & 26 Vic. c. 101.

[7] *Contra;* the similar Act applies to every city and royal burgh in Scotland. 20 & 21 Vic. c. 73; 24 & 25 Vic. c. 17.

[8] A similar Act was passed for Scotland in 1863. 26 & 27 Vic. c. 108.

overseers or guardians appoint a person to enforce the Act, the expense being paid out of the poor-rate.[a]

1043. *Other statutes extending to Scotland.*—Many statutes which govern particular employments not already noticed, and interfere with these on grounds of public policy, extend equally to Scotland. Such are the statutes as to pawnbrokers, 39 & 40 Geo. III. c. 99, 23 & 24 Vic. c. 21; gunpowder, 23 & 24 Vic. c. 139, 24 & 25 Vic. c. 130; petroleum, 25 & 26 Vic. c. 66; coining, 24 & 25 Vic. c. 99; factories, 3 & 4 W. IV. c. 103, 7 & 8 Vic. c. 15, 10 & 11 Vic. c. 29, 13 & 14 Vic. c. 54, 16 & 17 Vic. c. 104, 19 & 20 Vic. c. 83, 27 & 28 Vic. c. 48; lace factories, 24 & 25 Vic. c. 117; bleaching and dyeing, 23 & 24 Vic. c. 78, 27 & 28 Vic. c. 98; mines, 5 & 6 Vic. c. 99, 23 & 24 Vic. c. 151, 25 & 26 Vic. c. 79; merchant shipping, 17 & 18 Vic. c. 104, 25 & 26 Vic. c. 63, 26 & 27 Vic. c. 51; bakehouses regulation, 26 & 27 Vic. c. 40; medical practitioners, 21 & 22 Vic. c. 90, 22 Vic. c. 21, 22 & 23 Vic. cc. 7, 66; trade marks, 25 & 26 Vic. c. 88; weights and measures, 5 & 6 W. IV. c. 63, 22 & 23 Vic. c. 56; adulteration of food, 23 & 24 Vic. c. 84; industrial and provident societies, 25 & 26 Vic. c. 87; corrupt practices at elections, 26 & 27 Vic. c. 29.

[a] 3 & 4 Vic. c. 29; 4 & 5 Vic. c. 32; 16 & 17 Vic. c. 100; 24 & 25 Vic. c. 59.

PART VI.

COURTS, JURISDICTION, AND PROCEDURE.

CHAPTER I. THE SUPREME COURTS.

II. THE SUPERIOR COURTS.

ACTIONS AT LAW.

EVIDENCE.

SUIT IN CHANCERY.

III. COUNTY COURTS.

IV. COURTS OF BANKRUPTCY AND INSOLVENCY—ARBITRATION.

V. THE LEGAL PROFESSION.

CHAPTER I.

THE SUPREME COURTS.

THE HOUSE OF LORDS.

1043. *Jurisdiction.*—The House of Lords is the supreme tribunal, to which there is an appeal from all the superior courts of law and equity in England and Ireland.[1] The appeal from the common law courts of England and Ireland is by suggestion of error (formerly called a writ of error) on the judgment of the Exchequer Chamber. The appeal from the English or Irish Court of Chancery and Courts of Probate and Divorce is by a petition of appeal. Error can only be suggested on a final judgment of a court of law; but an appeal lies against interlocutory orders, as well as final decrees in a cause in the Court of Chancery.[a] [2]

1044. *The judges.*—The constitution of the House of Lords, as a court of justice, is anomalous, all the peers of the house who attend being in theory the judges, though in practice those only attend and take an active part who are law lords, *i. e.*, who have been trained to

[a] See Macqueen's Practice of H. L.

IN SCOTLAND.

[1] There is also an appeal from judgments of the Court of Session, and from decisions of that court sitting as a Teind Court. The statutes regulating the right of appeal to the House of Lords are 48 Geo. III. c. 151; 55 Geo. III. c. 42; 59 Geo. III. c. 35; 6 Geo. IV. c. 120; 1 W. IV. c. 60; 13 & 14 Vic. c. 36. See *Johnston* v. *Johnston*, 31 Sc. Jur. 764.

[2] The right of appeal lies, *prima facie*, against everything in an action in the Court of Session—final decree as well as interlocutors not final. But the statutes have cut down this common law right, and restricted it to final judgments, or interlocutors exhausting the merits, and interlocutors not final, where the judges have differed in opinion. *Johnston* v. *Johnston*, 31 Sc. Jur. 764. In certain other cases, interlocutors not final may be appealed against, if leave of the court be obtained. See *Scots Mining Co.* v. *Leadhills Co.* 31 Sc. Jur. 567.

the law and have filled judicial offices. In cases of error from the common law courts, the house now invariably summons the common law judges to hear the arguments and give their opinions to the house, which opinions, however, are not always adopted. In appeals from the Court of Chancery, the common law judges are also occasionally summoned.[a] [1]

1045. *Precedence of counsel.*—Scotch, English, and Irish counsel are allowed to practise at the bar of the supreme court indiscriminately, without respect to the court from which the appeal comes. The English Attorney-General, by an order of the house, has precedence over the Lord Advocate, and the English Solicitor-General over the Scotch Solicitor-General. The Dean of Faculty's right to precedence is uncertain. Nor does it seem to be settled, which of the law officers of Ireland and Scotland respectively would be entitled to lead.

1046. *Judgment of the House.*—The Lord Chancellor, who usually presides over the court, is on the same footing as the other peers, and the decision is that of the majority of the law lords who have attended the argument. If the judges are equally divided, the judgment of the court below is affirmed.

1047. *Costs on reversal.*—It is almost an invariable rule of the house, on reversing a decision, not to give the costs of the appeal to the successful appellant, but the house may, and generally does, order the costs, which he has been made to pay in the court below, if any, to be repaid to him. In reversing a judgment of the Court of Chancery, and dismissing a bill with costs, if nothing is said as to the repayment of costs incurred in the court below to the party who ought to have succeeded according to the decision of the House of Lords, the court below will nevertheless order such repayment.[b] [2]

[a] See Macqueen's Pract. of H. L. [b] *Thorpe* v. *Mattingley*, 1 Phill, 443.

IN SCOTLAND.

[1] The House of Lords has on some occasions ordered the attendance of the English common law judges to hear the arguments in Scotch appeals. But the orders have never been carried out, and this course is generally avoided. There is no power to summon the assistance of the Scotch judges in Scotch causes.

[2] *Contra;* in reversing a decree of the Court of Session, if the house says nothing in the order as to costs below, the court below will frequently

The Judicial Committee of the Privy Council.

1048. *Effect of appeal on suit in court below.*—When error is suggested on a judgment of the Exchequer Chamber, and the note of the receipt thereof has been served on the opposite party, there is a supersedeas of execution until default, or discontinuance, or final judgment of the House of Lords; but if the grounds of error are frivolous, the court below or a judge, on summons, may order execution to issue.[a] In appeals from courts of equity execution is not stayed; but on application to the court below, or, if such court refuse, to the House of Lords, an order to stay proceedings may be made.[b] [1]

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

1049. *The Privy Council.*—The judicial committee of the Privy Council is also a supreme tribunal, entertaining appeals and writs of error from the colonies and settlements, as well as appeals from the Ecclesiastical and Admiralty Courts of England. As remodelled by

[a] C. L. P. Act, 1852, § 150. [b] Macqueen's Pract. of H. L. 239.

IN SCOTLAND.

notinte rfere with the costs, on the ground that its power is gone. The rule was thus stated by Hope, L. J. C., in *North British R. Co.* v. *Todd*, 9 D. B. M. 1459 :—"If the court be entitled, under a judgment of the House of Lords, to resume consideration of any part of a cause, they then become vested with power to decide as to expenses; being reinstated in the consideration of the case, they possess the discretion of dealing with them. But, on the contrary, if the House of Lords has exhausted a case, and taken away the power of considering any part of it, this court cannot award any expenses. The court cannot give expenses when it does not possess the power of judging in the case." And general words in the order of the house, remitting to the court below "to proceed in the cause as shall be just," does not confer this power of dealing with costs. See *Purves* v. *Landell*, 7 D. B. M. 810; *Colquhoun* v. *Burrows*, 17 D. B. M. 245. See Macq. Pract. 343; Paton's Practice of Scotch Appeals.

[1] An appeal from a judgment of the Court of Session, when the order of the house is served on the respondent, stays execution in the court below. Standing order, 19 Ap. 1709; *Fleming* v. *Robertson*, 31 Sc. Jur. 667; *Tulloch* v. *Davison*, 30 Sc. Jur. 747. But the Court of Session has power to regulate all matters as to interim possession and execution. 48 Geo. III. c. 151; Macq. Pract. 328. And by 13 & 14 Vic. c. 36, § 13, an appeal does not interfere with points of the cause not necessarily dependent on the part appealed.

statute,[a] the court consists of the leading judges *ex officio* of the other courts.[1] The court, on reversing a decision of the court below, frequently gives the costs of the appeal to the appellant.

CHAPTER II.

THE SUPERIOR COURTS.

1052. *Division into courts of law and equity.*—The superior courts are divided into courts of equity and courts of common law, which in the practical result means that there is a subdivision of labour among the courts, each appropriating certain remedies exclusively. The courts of common law early adopted certain forms of action, under which they assumed that all possible grievances must necessarily arrange themselves. Hence, if a novel and complex state of circumstances arose which none of those forms exactly suited, the court in its wisdom resolved that, as the circumstances must yield to the form, and not the form to the circumstances, if the suitor could not adapt his case to one or other of the established forms, he must go without a remedy altogether; and they dismissed him accordingly to outer darkness. Thus a supplementary jurisdiction sprung up in the Court of Chancery, which originally sought only to remedy gross cases of hardship overlooked by the common law courts, but gradually profiting by the owl-like wisdom of these courts, at last extended and consolidated itself to such a degree that now about one-third of the litigation of the country finds its way into that channel.[2]

1053. *Anomalies arising from this division of jurisdiction.*—

[a] 3 & 4 W. IV. c. 42.

IN SCOTLAND.

[1] There is no appeal from any of the courts in Scotland to the judicial committee of the Privy Council.

[2] There is no division into courts of law and equity, the Court of Session administering both law and equity together. Hence, in actions for breach of contract the suitor sues for implement or damages in one action.

Many anomalies arise out of this subdivision. The most conspicuous of these is, that courts of common law pretend to have no organs to comprehend the nature of a trust. Hence they generally treat the trustee as the absolute owner; whereas the Court of Chancery having such organs, treat the *cestui que trust* or beneficiary as such owner, and the trustee as a mere *conduit pipe* or strong box to hold property for his benefit. The result is, that while the one court decrees that A is entitled to the property which is the subject of the suit, the other court decrees that B is so entitled. And if the court of common law give judgment on one day for A, the court of equity will next day suspend, by injunction, that judgment, and, in effect, reverse it. Again, a court of common law has no organs to enforce a contract or work out a decree. It can only give a judgment absolute in its nature and unconditional in its terms. It will neither force a person to carry out his contract nor prohibit him from breaking it; all it will do is to punish him with damages after the mischief is done. A court of equity, however, undertakes to do all these things by operating upon the conscience of the suitor, and under threats of committing him for contempt, circuitously carrying out its objects. On the other hand, a court of equity, except in a few cases under a recent statute, viz., cases where the plaintiff seeks an injunction or specific performance, has no organs to try an issue of fact by means of a jury so as to estimate questions of damages, and when such issues arise in the course of a suit, all it can do is to send such issues to a court of common law, whose machinery is specially adapted for such operations.

1054. The practical result, however, is, that there is merely a subdivision of jurisdiction. If a suitor wants to recover damages for breach of a contract, or for the committing of some wrong or for some failure of duty, and nearly all litigation resolves itself into this final object, he goes to a court of common law. On the other hand, if his object is to enforce specific performance of a contract, or to bring a trustee to an account, or to recover a legacy from an executor (an executor being, in most respects, on the footing of a trustee), or to obtain an injunction, then he goes to a court of equity. One undoubted advantage of this subdivision of labour is the greater precision thereby acquired by both sets of courts in dealing with the rights falling under their respective jurisdictions. But, on the other

hand, there are still greater disadvantages. The bar has come to be divided into two distinct classes, each of which professes to be unacquainted with the other complement of the law, constituting the staple business of those courts in which the other class practises. Much additional expense is thus caused by the necessity of consulting two sets of advisers, and by sending a suitor from one court to another and administering relief by halves and instalments; and in many cases the suitor requires to carry on two or more suits and branches of suits instead of one. Of late years the jurisdictions of the respective courts of law and equity have been extended so as in many points to overlap each other, and the tendency now is for their field of operations ultimately to coincide so as to enable either or any court to do complete justice between the parties, however complicated and multifarious may be the circumstances of each case.

COURTS OF COMMON LAW.

1055. *Number of courts.* — The superior courts of common law are three in number, the Court of Queen's Bench, the Court of Common Pleas or Common Bench, and the Court of Exchequer.[1]

IN SCOTLAND.

[1] The Court of Session is divided into five courts, each presided over by a single judge called a Lord Ordinary, each party choosing his own Lord Ordinary; though in the event of an accumulation of causes before one or more Lords Ordinary the Lord President can remove a portion of the cases to any other Lord Ordinary. The above judges constitute the Outer House, and in general all causes commence before one or other of the Lords Ordinary. The Inner House consists of two chambers, each consisting of four judges, and having co-ordinate jurisdiction; one of these is called the First Division, presided over by the Lord President or Lord Justice General, and the other is called the Second Division, presided over by the Lord Justice Clerk. In general the business consists of reclaiming notes from the Lord Ordinary's judgments, but there is now little original business brought before the full court or Court of Session in the first instance. There is also a court, called the Court of Exchequer, consisting of two judges of the Court of Session, acting in rotation, for disposing of matters of revenue.

Courts of Common Law.

Each has a concurrent jurisdiction in nearly all causes of action which arise at common law, and the suitor can choose any of the courts he pleases, and there is no power in the Lord Chancellor or other judge to remove a cause from one court to another. Each court also has an exclusive or peculiar jurisdiction superadded to its ordinary jurisdiction. Thus, the Court of Queen's Bench has an extensive criminal jurisdiction, both original and appellate, the former of which, however, practically is seldom made available. Its action is confined to superintending the proceedings of justices of the peace, and by removing by *certiorari* into its own jurisdiction convictions and orders of justices, which it quashes or confirms according to law. It can also command inferior courts, magistrates and public bodies, railway companies, municipal corporations, etc., to do any public duty incumbent on them by the prerogative writ of *mandamus*,[1] and it prohibits them from doing some irregular act beyond their proper jurisdiction by the writ of *prohibition*. The Court of Common Pleas has exclusive jurisdiction in real actions, but no longer in the mixed action of ejectment, which is an action primarily to recover the possession of land. It also regulates certain companies, under the authority of the Railway and Canal Traffic Act, revises the revising barrister's decisions as to claims to vote at elections of Members of Parliament, and regulates the taking of acknowledgments of the deeds of married women. The Court of Exchequer[2] has an exclusive jurisdiction as to debts and duties in matters of revenue due to the Crown, and which are recovered by informations filed by the Attorney-General.[a]

[a] See generally Paterson, Macnamara, and Marshall's Common Law Practice; Chitty's Archbold's Practice by Prentice; Lush's Practice by Stephen.

IN SCOTLAND.

[1] The Court of Session has no summary control of this nature over public bodies. The remedy is an action of declarator, or suspension and interdict, or an action of damages, according to circumstances. The court, however, controls inferior courts.

[2] There was also, until recently, a separate court called the Court of Exchequer, which had no other than a revenue jurisdiction and a certain jurisdiction in questions between the Crown and its vassals, where no question of title was involved. The processes in use resembled those in the English Court of Exchequer. The court is now merged in the Court of Session, and its proceedings regulated by the statute 19 & 20 Vic. c. 56.

1056. *Arrangement of business.*—The courts of common law consist each of five judges, four of whom only sit together at one time during the legal terms, *i.e.*, Michaelmas, Hilary, Easter, and Trinity, each term lasting about three weeks, when the court sits in banc, and disposes of all causes depending after hearing arguments of counsel. The terms are fixed by statute. Hilary Term begins on 11th and ends on 30th January; Easter Term begins on 15th April, and ends on 8th May; Trinity Term begins on 22d May, and ends on 12th June; Michaelmas Term begins on the 2d and ends on the 25th November. When there is a pressure of business, each court has power to appoint additional days of sitting after term. During term the court sits every day of the week, except Sundays.[1]

A cause is not heard before a single judge in the first instance, but comes before the whole court sitting together; and if there is nothing but an issue of fact involved in a cause, then without ever coming before the full court at all (except where a motion may be made there), it may be tried by a single judge sitting at *nisi prius* along with a jury, or without one, if the parties so consent. Motions in reference to an action at law are made either to a judge at chambers or to the full court, according to circumstances, and there is generally an appeal from a judge at chambers to the full court.[2]

1057. *Exchequer Chamber.*—The appellate court from each of the common law courts is the Exchequer Chamber, which consists of all the judges of the three common law courts; but when there is a judgment from any one court in review on a suggestion of error (formerly a writ of error), then the Exchequer Chamber consists of

IN SCOTLAND.

[1] *Contra;* the Court of Session never sits on Mondays, though it is usual for the Court of Justiciary to sit on that day. There are two sessions of the court in a year. The winter session extends from the 12th November to 20th March, with an adjournment of twenty days from the Tuesday before Christmas-day to the third Saturday following. The summer session extends from 12th May to 20th July.

[2] *Contra;* the same Lord Ordinary in whose roll (cause list) the action is first entered superintends all the steps from first to last, and disposes also of incidental motions or applications. He then decides it on the merits, and there is an appeal by reclaiming note from his judgment to the Inner House. If issues are required to go to a jury, these may be tried by himself, but are generally tried by the chief judges of each of the two divisions of the Inner House.

the judges of the two other courts combined. The next stage is a suggestion of error to the House of Lords.[1]

1058. *Forms of actions.*—All actions which are competent in courts of law arrange themselves under a few heads or forms of actions, the pleadings in each having appropriate language, which by long usage has become familiar and precise. Formerly it was difficult to determine which of two or more actions was the proper remedy in certain situations, and the slightest mistake in the form of action was fatal, or at least caused great expense; but now the importance of such mistakes is greatly lessened, though the old names of actions are still retained for the sake of convenience. Actions are divided into personal, and into real and mixed;[2] and the personal actions, which are by far the most numerous and important, are divided into actions *ex contractu* and *ex delicto*, *i. e.*, according as they are founded on some contract between the parties, or on tort, which is some wrongful act done irrespective of any contract.

IN SCOTLAND.

[1] Neither the First nor Second Division can act as an appellate court to the other, but in important cases, when one court is equally divided, it can order a fresh hearing before the full court, consisting of all the thirteen judges, after which the consulting court gives judgment according to the opinion of the aggregate majority of the judges present. 13 & 14 Vic. c. 36, § 35.

[2] Actions are generally divided into petitory, possessory, declaratory, rescissory, accessory, and summary. Petitory actions are actions of damages (as assumpsit, debt, covenant, trespass, case). Possessory actions are those in which the possession of heritable or moveable property is recovered and tried, and an action of molestation is one of them (ejectment, detinue, trover). Declaratory actions, or actions of declarator, are those in which a mere declaration of a right is sought, without any other immediate relief (not known at common law; yet a bill praying for a declaration generally, but not now necessarily coupled with other relief, exists in Chancery; and there is a petition for a declaration of legitimacy, etc., in the Divorce Court). These actions of declarator are applicable to nearly all departments of the law, and are very frequently resorted to, either as substantive remedies or as conjoined with other actions. Rescissory actions, some of which may be included in declaratory, are raised to reduce deeds, writings, etc., otherwise known as actions of reduction, and of reduction-improbation (not known at common law, but the nullity may be set up there as a defence, and in Chancery these are known as bills to set aside deeds, etc.) Accessory actions are dependent on other primary actions. Summary actions are those commenced by petition (at common law by way of motion or rule *nisi*; in Chancery by way of petition or motion).

The chief actions are assumpsit, debt, covenant, trespass, case, trover, detinue, replevin, ejectment. All are more or less actions to recover damages except ejectment, which is the action to recover possession of land, to which, however, damages or *mesne* profits may also be added. Assumpsit lies for breach of a simple contract or contract not under seal; while covenant lies for breach of a contract which was entered into by deed or under seal. Debt lies to recover any liquidated sum which is due, and its primary object is to recover the money irrespective of damages, properly so called. Trespass lies for any assault or false imprisonment of the person, or any invasion of the house or land of the plaintiff, or direct injury to his goods. Case lies for similar injuries caused not by immediate violence, but more indirectly. Detinue lies for detaining goods, its primary object, however, being to get the chattels themselves, and not damages. Trover, on the other hand, lies for the conversion or appropriation of goods, its primary object being to recover damages for the loss of such goods. Replevin lies for wrongfully distraining or taking goods of the plaintiff, the goods being given back to or replevied by the plaintiff on his giving security, and bringing the action to try his right to them.

1059. *Jurisdiction over foreigners.*—Any foreigner, provided he is casually present in England, and can be personally served with the writ of summons, may be sued in a court of common law if the cause of action is in its nature personal, that is, if it arose upon some contract or trespass to the person. It is otherwise, however, if the action is not transitory, but local in its nature, such, for example, as an action of trespass on the plaintiff's land in St. Petersburg. If the defendant is once served with the writ in a personal action, then judgment can ultimately be obtained whether he appears and pleads or not. And if the cause of action is above £20, and the defendant, whether a foreigner or not, is about to leave the country, he may be arrested on *mesne* process, and held to bail.

But if the foreigner is not in England, then he can only be sued in those cases where the cause of action arose within the jurisdiction, and, moreover, the defendant must be personally served with notice, or at least he must be shown to have knowledge of the writ. In the same manner, if an English subject is abroad, or elsewhere out of the jurisdiction except in Scotland or Ireland, he can

only be sued in an English court of law where the cause of action arose within the jurisdiction, and moreover, he must be personally served with the writ, or it must be shown it came to his knowledge before any proceedings can be taken in the action. There is an exception of persons residing in Scotland and Ireland, for they cannot, unless they have been personally served with process while in England, be sued in an English court whether the cause of action arose in England or not. They must be sued in Scotland or Ireland respectively, where they are residing.[1]

1060. *Foreign attachment.*—In general, it is essential that a defendant be personally served with the writ of summons, and until this be done the action cannot proceed.[2] There is no mode of founding jurisdiction against foreigners or others who happen to have chattels belonging to them or money due to them in the hands of third parties within the jurisdiction, by attaching such chattels or monies, and it matters nothing that such foreigner has personal property within the jurisdiction of the English courts. But an exception exists by ancient custom in the city of London, *i. e.*, the city proper, called foreign attachment.[3]

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[1] *Contra;* it is immaterial where the cause of action arose, and foreigners, when the jurisdiction is properly founded by arrestment *jurisdictionis fundandæ causa*, need not be personally served with any copy or notice of the action; it is enough that there is an edictal citation, *i. e.*, the citation is handed into the office of the keeper of edictal citations. 13 & 14 Vic. c. 36, § 22.

[2] *Contra;* execution at the dwelling-house is, in general, equivalent to personal execution, and either is competent.

[3] *Contra;* "foreign-attachment" is the common law of Scotland. Thus, whenever a foreigner or Englishman, not residing in Scotland, has goods or monies in the hands of third parties in Scotland, any creditor there can arrest such goods or monies, and by this means create a jurisdiction against the foreigner, who can then be sued for all causes of action for debt which the creditor has against him. Thus, if an Englishman leaves a chattel in a Scotch hotel, or even, it is said, "a toothpick at a penny the dozen," any creditor in Scotland can arrest the chattel, and build upon it a jurisdiction by which the Englishman will be liable to have decree in absence against him. No personal service or notice is required in such cases to be given to the foreigner, an edictal citation (like sticking up notice on the walls of the court) being sufficient. And even funds in the hands of an arrestee, who is furth of Scotland, may also be arrested; provided now, however, that

1061. *Jurisdiction over persons abroad being owners of real property in England.*—Where a foreigner or British subject has real property in England but lives abroad, this circumstance alone does not give the courts of common law any jurisdiction, except the cause of action as above stated arose in England and he has notice of the writ of summons served in the action. But if the action was one of ejectment to recover such real property belonging to a foreigner or person living abroad, the absence of the owner abroad would not be an obstacle to the suit being proceeded with.[1]

OUTLINE OF AN ACTION AT LAW.

1068. *Writ of summons.*—The first step in an action is to issue or sue out a writ of summons, which is a printed form in parchment, sold by law stationers, and being filled up with the defendant's name, is taken by the plaintiff or his attorney to the office of one or other of the three courts, with a præcipe, *i. e.*, a short written memorandum stating the names of the parties. The præcipe is kept and filed by the officer of the court, and the writ is sealed or stamped with the name of the court and given to the bearer. The moment this writ is sealed and given out, the action commences.[2] The attorney keeps possession of the original writ throughout the entire proceedings. The writ is a mere citation,[3] and gives no details as to the cause of action, but merely calls on the defendant to enter appearance in

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the arrestment has come to the arrestee's knowledge. 19 & 20 Vic. c. 91, § 1. The defender may go to Scotland and open up or reduce the decree in absence, which he can do any time within forty years. See *London & North W. R. Co.* v. *Lindsay*, 30 Sc. Jur. 336; 3 Macq. Ap. 99. The process for creating the above jurisdiction is called *arrestum jurisdictionis fundandæ causa.*

[1] *Contra;* all foreigners or others holding heritable property in Scotland are amenable to the jurisdiction of the Court of Session, not only as to matters affecting such estate, but also as to personal claims of debt, and may be cited edictally, because they are presumed to have an agent or solicitor in Scotland to attend to their interests.

[2] *Contra;* the action does not commence until the defender has been cited and the summons has been called in court.

[3] The action commences with a summons, which is more than a mere

Outline of an Action at Law.

eight days. Its form in the Queen's Bench is, "Victoria to C D: we command you in eight days to enter appearance in an action at the suit of A B, in our Court of Queen's Bench, and take notice, that in default he may proceed therein to judgment and execution. Witness, Sir Alexander James Cockburn, Baronet." There must be an indorsement on the writ, if it is for a debt or sum certain, stating the amount claimed, and also that if paid, with costs, within four days after service, all further proceedings will be stayed.

1069. *Service of writ.*—The plaintiff's attorney then serves the writ of summons, which is generally done, not by any officer or bailiff, but by the attorney's clerk or any other person[1] taking the original with him and giving a copy to the defendant personally. The original is taken, because the defendant may ask to see it, in which case it must be produced, so as to allow the defendant to read it. Though personal service is in general essential, it is not always indispensable; for after using every exertion in vain to find the defendant, if it appear that he is keeping out of the way, or has

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citation, and contains shortly the conclusions of the action (the prayer). It varies in form according to the nature of the action. It also has annexed to it the condescendence (declaration) fully stating the grounds of the action.

The ordinary summons is a writ in the Queen's name, addressed, not to C D, but to all messengers-at-arms, thus: "Victoria, to all messengers-at-arms greeting: Whereas it is humbly meant and shown to us by our lovite, A B, pursuer, against C D, defender, in terms of the condescendence hereunto annexed: Therefore the defender ought and should be decerned and ordained; by decree, to make payment to the pursuer of the sum of, etc. Our will is herefore, etc. (Then follows an authority to the messenger-at-arms to cite C D.) Given under our signet at Edinburgh." 13 & 14 Vic. c. 36.

[1] *Contra;* a messenger-at-arms can alone execute the summons, and a formal execution attested by one witness is sufficient, and the only proof of service. Stats. 1672, c. 6; 1693, c. 12; Darling's Office of Messenger; 1 Vic. c. 41, § 21; 9 & 10 Vic. c. 67; 13 & 14 Vic. c. 36; 16 & 17 Vic. c. 80; Ersk. 4, 2, 5; Shand's Practice. No affidavit is necessary, but the messenger subscribes a memorandum at the foot of the summons. 13 & 14 Vic. c. 36, § 20.

The messengers-at-arms are bailiffs or officers who are under the control of the Lord Lyon, to whom they give a bond, with cautioners, for the due execution of their duties. In executing summonses, etc., they are not confined to any particular county, but have the run of all Scotland.

gone abroad to avoid personal service, the plaintiff may apply to a judge for leave to proceed in the cause, after a substituted service, *i. e.*, by doing something as an equivalent for personal service, such as leaving a copy at the last place of abode.[1] No witness is required to the service,[2] but the affidavit of the person who gave the copy to the defendant is sufficient evidence thereof. If the service is irregular, the defendant may apply to a judge, in a summary way, to set aside the service, and the judge has power to do so.[3] If the defendant pleases, he may dispense with personal service,[4] and authorise his attorney to enter an appearance on receiving a copy of the writ. If the summons is not served within six months, its force is spent, but it may be renewed from time to time, and so the action may be kept alive by the writ being every six months re-stamped until it is served.

1070. *Entering appearance.*—When the defendant is served with the writ, he must, in eight days, enter an appearance, which is done by himself or his attorney going to the master's office, and giving in a memorandum, stating that he appears.[5]

1071. *Non-appearance and judgment by default.*—If the defendant, after being served, fail to enter an appearance, then, after the eight days, the plaintiff may, in certain cases, sign judgment by default, viz., where the writ has been specially indorsed, *i. e.*, where the claim is for

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[1] *Contra;* personal service is not, in general, necessary. Execution of the summons may always be by leaving a copy at the dwelling-house of the defender.

[2] *Contra;* a witness is necessary, besides the messenger-at-arms. 13 & 14 Vic. c. 36.

[3] *Contra;* the execution of the summons, if *ex facie* regular, requires to be reduced by a regular action of reduction, and cannot be set aside in a summary way by the Lord Ordinary or the Court.

[4] So the defender may dispense with the induciæ.

[5] The summons used to be called by the pursuer at the diet of appearance, when the defender's agent appeared and gave in a *partibus* (*præcipe*). Now appearance is entered at the clerk's office, and the parties' names are put in the lists, which are printed. The *induciæ*, or time given for the defender to enter appearance, in ordinary actions, is fourteen days, unless he reside in Orkney or Shetland, or abroad, when it is twenty-one days. 13 & 14 Vic. c. 36, § 21. The defender has, thirteen days after the summons is called, to prepare and lodge his defences.

a definite and certain sum, called a liquidated demand, and the particulars of demand have been stated on the back of the writ. Execution may then issue in eight days more. If, however, the defendant, before execution, satisfactorily account to the court for his non-appearance, he may, on payment of costs, be let in to defend.[1] In all other cases, before signing judgment, the plaintiff must first file or serve a declaration.

1072. *The declaration.*—The pleading in which the plaintiff states his facts is the declaration,[2] which consists generally of several counts. Some of these are called the money counts, or indebitatus counts, or common counts, from their general and extensive application, and from their being generally added to the other and special counts. With the declaration is often added "particulars of demand," that is, a copy of the account or items in respect of which the action is brought. It is in general compulsory on the plaintiff to annex to the common counts these particulars of demand, unless they are of great length; and it is a common application of the defendant to a judge at chambers to order particulars, or better particulars, to be given.[3]

1073. *The plea, the general issue, etc.*—The defendant's pleading is called technically the plea,[4] which, in reality, consists generally of several pleas. Pleas are divided into preliminary pleas (of which

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[1] So the pursuer may obtain decree in absence, on which diligence may proceed; but the defender will be reponed on paying expenses.

Decree in absence may be opened up, or, if it has been extracted, the defender and his representatives have the remedy of suspension or reduction, any time within forty years, unless they have homologated the decree, or otherwise barred themselves.

[2] The "condescendence" is the pursuer's statement of his grounds of action, and is annexed to, and forms part of, the summons. Then follow his "pleas in law," *i. e.*, the points of his pleading stated shortly in abstract propositions. Copies of accounts and other documents founded on are lodged as productions in process.

[3] The pursuer generally, as a matter of course, refers in his condescendence to a copy of the account; and, moreover, the condescendence itself generally embodies a statement of the mode in which the debt was contracted, which is the ground of the action.

[4] The word "plea" is used to denote the short points of law (like points in a demurrer-book), annexed by both pursuer and defender to their respective

the chief are pleas in abatement) and pleas in bar. Pleas in abatement are not encouraged, and require to be verified by affidavit; and they are generally for misnomer, or misjoinder, or nonjoinder of parties. If the plea in abatement is sustained, the judgment is *cassetur breve*, or that the writ be quashed; if the plea is overruled, the judgment is generally *respondeat ouster*, that the defendant plead over, *i. e.*, give some other answer.[1] Pleas in abatement must always be pleaded before pleas in bar.[2] Pleas in bar, or peremptory pleas, are too numerous to be mentioned, but there are several having well known names, from their frequent recurrence, as the pleas of set-off,[3] infancy,[4] coverture,[5] the statute of limitations,[6] discharge under the Bankrupt Act,[7] discharge under the Insolvent Act. Some pleas are merely a general denial of the debt or liability alleged in the declaration, and raise what is called the general issue; such are *non-assumpsit*, *i. e.*, that he never made the promise; *non est factum*, *i. e.*, that he did not make the deed; *nunquam indebitatus*, *i. e.*, that he never was indebted; not guilty, etc. When the general issue[8] is

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statements of facts, and are called pleas in law. The "defences" is the name of the defender's entire pleading.

The way in which the defender constructs "the defences" is this:—He first answers *seriatim* each paragraph of the condescendence; and then he adds a "statement of facts," in which he sets forth in his own way, and in paragraphs, his own case. The answers are often very concise and vague; thus—"Denied;" "Not known and not admitted;" "Admitted, under reference to the deed (or statute) itself,' etc.

[1] When the dilatory defence is held good, an interlocutor is pronounced sustaining it; if held bad, it is repelled. Sometimes it is reserved to be discussed with the peremptory pleas on the merits.

[2] Preliminary and dilatory pleas are pleaded along with, and at the same time as pleas peremptory, yet the Lord Ordinary disposes of the former first. 6 Geo. IV. c. 120, § 5; see last note.

[3] Compensation.

[4] Minority.

[5] That the defender is a married woman.

[6] Prescription.

[7] Discharge under sequestration.

[8] The general issue is unknown, and no artificial rules in general are applicable to pleadings. The same object is attained in another way by requiring the grounds of action and defence to be fully set out in the respective statements of fact of the parties. It has been held that these statements of fact control and restrict the line of evidence at the trial, even

pleaded, certain facts only can be disputed at the trial, and if other matters of defence are intended to be raised, the defendant must plead these specially, in a separate form, and hence these are known as special pleas. Thus infancy, coverture, set-off, the statute of limitations, etc., must be pleaded specially.

1074. *The replication, rejoinder, surrejoinder, etc.*—The plea being delivered, the plaintiff in turn may, if he intend to set forth new facts, reply, and his pleading is called a replication. Then the defendant may rejoin in a rejoinder. Next, the plaintiff may surrejoin in a surrejoinder, and the defendant may rebut in a rebutter, and the plaintiff may again surrebut in a surrebutter.[1] After this stage the pleadings have no name, and, indeed, the pleadings generally come to an issue before the rejoinder. No pleading requires to be signed by counsel.[2] The pleadings are never printed,[3] nor does the court ever order the written arguments of counsel to be printed, all arguments being *viva voce*.[4] If, however, the case is taken to the House of Lords, the pleadings must then, by a standing order of the house, be printed. The parties have no power or opportunity to amend their pleadings after these are once delivered, but they must apply to a judge for leave to do so.[5]

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though the issue is general; but the House of Lords has generally discountenanced this doctrine. See *Morgan* v. *Morris*, 30 Sc. Jur. 686. The Court of Session however adheres to it.

[1] The pleadings acquire no distinct names from the successive stages of the action. Each may revise and re-revise his pleading, and these are called "revised condescendence" and "revised defences" respectively.

[2] *Contra;* the pleadings are still signed by counsel as a matter of form.

[3] *Contra;* it is not necessary to print the summons and defences, or any part of the process, before the closing of the record; but at that stage the Lord Ordinary may order the record to be printed, and generally does so, each party bearing half of the expense of printing. 13 & 14 Vic. c. 36, § 6.

[4] *Contra;* the court often orders in nice and difficult questions, "cases" or "minutes of debate" to be given in, *i. e.*, printed arguments and discussions of counsel. Formerly the Lord Ordinary also usually ordered these "cases," which extended to great length; but now he has no power to order them, and instead, he may, without deciding the cause, report the same to the Inner House, thereby devolving the decision on the Inner House. 13 & 14 Vic. c. 36, § 14.

[5] *Contra;* each party is entitled to revise his pleading, and this is generally ordered as a matter of course. They are then called the revised condescendence and revised defences respectively.

1075. *Time to plead, etc.*—If either party want to limit the time for his opponent delivering his pleading, he serves a notice to declare, notice to plead, notice to reply, etc., as the case may be (for which a certain number of days are allowed), otherwise judgment.[1] If the plaintiff do not declare within a year, and has not been compelled to do so by the defendant serving a notice to declare, he is out of court, and a new action must be raised.[2]

1076. *A month's notice, if no step for one year.*—If after declaration in the action no step has been taken by either party for a year, neither can resume proceedings without giving his opponent a month's notice before taking the next step.[3]

1077. *Special pleading.*—Special pleading is a system of artificial rules for the guidance of parties, the object of which is to enable them to go on with their action without the interference of the court, and yet without drowning themselves in irrelevant matter. It saves the time of the judges, and, therefore, the public time,[4] for by means of it they get rid of all superfluous matter, and at last come to a point or issue. Formerly this system was carried to excess, and special demurrers were encouraged, by which astute objections were raised, which, though scientifically sound, were founded on the assumption that the construction most unfavourable to the party pleading must always be adopted. Now, however, special demurrers are abolished, and a reasonable construction is put upon pleadings as well as other documents.

Throughout the pleadings after the declaration, either party may

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[1] The one party may apply to the judge to circumduce the term with certification, *i. e.*, if the pleading is not lodged, decree will be extracted.

[2] So the defender may, by protestation, compel the pursuer to proceed, or to suffer the instance to fall, etc. The party at that or other future stage lodges protestation, which he extracts, and is allowed costs.

[3] So there must be an interlocutor of wakening after fifteen days' intimation, the process being assumed to have fallen asleep. Formerly, in such circumstances, a summons of wakening required to be raised.

[4] There is no such system of rules in operation. Each party pleads at large, and states all he considers material. The only restriction is, that he shall state it briefly without irrelevant matter, and avoiding argumentative views of facts; but each party generally follows his own notions of propriety, subject occasionally to correction from the court for any glaring abuse.

meet his opponent's pleading in three ways:—First, he may demur to it, *i. e.*, assuming the facts to be true, he may deny the inference in point of law. If he demur, then the other party must join in demurrer, and the joinder in demurrer raises at once an issue in law. If, however, he not only deny the legal inference, but deny also the facts from which the inference is deduced, he must apply to a judge for leave to plead and demur to the same pleading, which is only allowed on condition that the party doing so make an affidavit of the truth of the matters of fact he intends to plead.[1] Secondly, the party may *plead* to his opponent's pleading, which is done by way of alleging further facts, or, as it is called, confession and avoidance, *i. e.*, he admits that the facts stated by his opponent may be true, but there are further facts which displace their effect.[2] Thirdly, the party may traverse the facts alleged by his opponent, either by singling out one material fact, or sometimes by a general traverse, as where the plaintiff, in his replication, joins issue on the plea. In one or other of these ways the parties at length come to an issue, and join issue, which is either an issue in law or in fact.[3] This result is arrived at by the parties, in general without any interference of the court or a judge, and no sanction of the court is required to join issue.[4] It is a rule of pleading that a party must not plead his

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[1] So by a plea to the relevancy, which has this difference, that it requires no leave of the court to deny the facts at the same time, as well as the law applicable thereto.

[2] Each pleading, or statement of facts, consists of paragraphs, and a common mode of answer to each is, "denied," or "denied, under reference to such and such a deed or statute." It is considered astute to admit nothing, or as little as possible, though sometimes a bare statement of fact is answered, "admitted," but oftener "not known and not admitted."

[3] So the parties, after having revised or re-revised their pleadings, and having exhausted all their facts, agree to close the record, after which they cannot, without leave of the judge, add more pleas. The judge assists at the closing of the record, and signs it as closed.

The closing of the record may take place on the summons and defences, but generally both parties first revise their pleadings. For the purpose of closing, the parties attend the judge at chambers, by their counsel, and he generally suggests alterations and amendments. If the parties agree, either then, or at some further time allowed, the judge pronounces an interlocutor closing the record. 13 & 14 Vic. c. 36, § 2, 3.

[4] *Contra;* after the record is closed, the parties are invited to agree

evidence, *i. e.*, he must allege some fact generally, leaving the details to be proved at the trial.[1]

1078. *Demurrer.*—When the parties join issue in law, the plaintiff makes up the record, *i. e.*, the pleadings are copied on paper, and this is called making up the demurrer-book. The case is set down for argument, a copy given to each judge, and the court in banc, after hearing argument, gives judgment for one or other of the parties, unless the party whose pleading is demurred to has previously asked leave to amend. On the margin of the demurrer-book must be stated shortly the points to be argued by each counsel.

Where there are issues in law, as well as in fact, it is optional with the plaintiff to have the trial or the demurrer disposed of first, subject to the discretion of the court, which, however, seldom interferes; but, in general, it is better to have the demurrer argued first, for it is the less expensive, and, if decided in one way, may render the other proceeding unnecessary.[2]

1079. *Issue of fact and trial.*—When the parties join issue in fact, this fact must (with two or three trifling exceptions, as in *nul tiel* record, *i. e.*, whether a certain judgment pleaded as *res judicata* exists in fact, etc.) be tried by a jury of twelve.[3] They cannot

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upon issues as to material facts, which are extracted from the pleadings. The judge must see and approve such issues before they are finally adjusted and sent to trial.

It is the duty of the pursuer to prepare and lodge in process the issues he proposes, and then the defender may lodge counter-issues, whereon the parties attend the judge at chambers, when he settles and adjusts the issues; or if the parties cannot agree, the Lord Ordinary reports the matter to the Inner House. 13 & 14 Vic. c. 36, § 38.

[1] *Contra;* this rule is not observed; for though mere minute details need not be set forth in the pleading, yet the party must give the outlines of his evidence, so as to show his opponent enough to enable him to meet the case set out, and be prepared with counter evidence. In this way surprise is prevented. See *Per L. Campbell, Neilson* v. *Houschill Coal Co.*, 2 Bell's Ap. 1.

[2] So the Court of Session in general disposes first of pleas to the relevancy, though sometimes they order proof before answer (*i. e.*, send the issues of fact to be tried before the issues in law).

[3] *Contra;* there are certain cases specified by statute which the court must send to a jury, called "the enumerated cases," such as actions for

choose their own jury, but may ask the judge to try the case without a jury.[1] The plaintiff gives ten days' notice of trial, and if he do not, after a certain time, do so, the defendant can compel him, by giving him a twenty days' notice to proceed, otherwise judgment.[2] The plaintiff also makes up the issue by copying all the pleadings on sheets of parchment, and this is called the *nisi prius* record, which is entered two days before the sittings or assizes.

The venue.—The trial must take place in the county stated in the venue at the commencement of the declaration. The plaintiff, in general, can choose the venue in all transitory actions, such as actions not connected with real property, etc., and he may afterwards, on cause shown, apply to alter the venue. The defendant may apply to change the venue to the county where the cause of action arose, which is generally allowed, if it meets the convenience of the case or of the witnesses. Where the venue is in the country, the cause cannot be tried until the assizes are held, *i. e.*, twice a year, and in some populous places thrice.[3]

1080. *Judge at chambers.*—Though in general the parties go on with the various steps of pleading without the intervention of the court, yet in special circumstances it is often necessary to obtain leave of the court or a judge for certain proceedings. This interlocutory business is disposed of by a judge of each court at chambers, *i. e.*, he sits in a private room and hears the attorneys or their clerks, and sometimes counsel on both sides.[4] In general, all applications of a

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assault, libel, seduction, etc. 6 Geo. IV. c. 120, § 28. But in other cases the judge may order the evidence to be taken by a commissioner, or, *in presentia*, *i. e.*, before himself.

[1] *Contra;* the parties may, by consent, choose three, five, or seven persons to be their own jury. The Lord Ordinary may, by consent, also try issues without any jury. 13 & 14 Vic. c. 36, § 48, 50.

[2] So the defender may take the lead and give notice of trial, or after twelve months the action will be dismissed.

[3] There is no venue. The trial in nearly all cases takes place, as a matter of course, in Edinburgh, though occasionally the pursuer gives notice of trial to take place on circuit. The trials on circuit are thus usually confined to criminal cases only.

[4] The Lord Ordinary does the same kind of business in open court, but the applications are mostly by counsel.

minor importance are made to a judge at chambers, and the more important applications are taken at once to the court in banc, if then sitting; and there is also in general an appeal from the decision of the judge sitting at chambers to the court of which he is a member. Such incidental applications are the following:—The judge may consolidate[1] actions on the same subject matter between the same parties. Either party may obtain an enlargement[2] of the time to plead, and the court may order a thing to be done peremptorily.[3] If one party fail to plead, etc., the other party may sign judgment, either judgment of *non prosequitur*, or judgment by default.[4] If the plaintiff wish to abandon the case, in whole or part, he may discontinue, or enter a *nolle prosequi*.[5] If the plaintiff reside abroad, he may be made to give security for costs.[6] If either party wish to amend his pleading after it is delivered to the other side, he cannot do so without leave of the judge, who generally allows it, only on payment of costs thereby caused.[7]

1081. *New matter of defence.*—If a matter of defence arise after the last pleading and before judgment, it may, within eight days, be pleaded by a plea *puis darrein continuance*.[8]

1082. *Order to examine parties.*—So during the action leave may now be obtained to examine either party, orally or by interrogatories,

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[1] So the judge may conjoin the processes.

[2] So the judge may prorogate the time for lodging pleadings, etc.

[3] So he may circumduce the term.

[4] So the other party may obtain protestation or decree in absence, and interim decree for expenses.

[5] So he may give in a minute of abandonment of action.

[6] So he may be made to sist a mandatary.

[7] *Contra;* it is the common course for either party to revise his pleading after receiving that of his adversary, and he can add or alter *ad libitum*, provided he do not introduce in the revised paper a new *medium concludendi*, or ground of action. *London Joint-Stock Bank* v. *Stewart*, 31 Sc. Jur. 38. It is only after the parties have revised or re-revised the condescendence and answers, that the closing of the record takes place, after which there can be no alteration without leave. Hence, in general, neither party requires special leave to amend, having ample opportunities for so doing.

[8] So either party may give in a minute or condescendence of *res noviter veniens ad notitiam*.

on oath.[1] And if the party refuse to answer, it is a contempt punishable by attachment and imprisonment.[2] The depositions or answers thus obtained are, however, only admissible at the trial if the party has died or become permanently sick.[a] [3]

1083. *Order to inspect documents,' etc.*—Either party may also apply for leave to inspect material documents in the hands of his opponent, or to examine him, so as to discover[4] whether such documents exist; but a mere fishing order is discountenanced.[5] Yet this cannot be done, in general, with regard to third persons not parties,[6] who, however, can be summoned as witnesses, and ordered to produce documents, etc., under a *subpœna duces tecum;* in some cases also they may be compelled to be examined before a commissioner and to produce papers.[b]

1084. *Deeds, etc., relied on in pleadings.*—Where either party, in his pleading, relies on a deed or document, he used formerly to allege profert, and the other side demanded oyer, *i. e.*, inspection and a copy, but the practice now is for the party so relying to set out part of, or the whole, document or deed, in which case it is deemed part

[a] C. L. P. Act, 1854, § 51; Paterson, M. & M. Pract. 155.
[b] C. L. P. Act, 1854, § 48, 49.

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[1] So the court may order a judicial examination, which is, however, not on oath; or may grant diligence to examine him as a haver, *i. e.*, the holder of documents.

[2] It is also contempt, and the party will often be taken as confessed, except in a few cases where proof is essential. 6 D. B. M. 342; *Crofts* v. *Crofts*, 2 D. B. M. 342.

[3] *Contra;* a judicial examination, though the party is in sound health, is admissible in evidence against him, though he may be called to contradict. *Wilson* v. *Beveridge*, 10 S. D. 110.

[4] So a diligence to examine the party as a haver may be obtained, or an order to produce documents, etc., under certification. In such applications the party seeking the diligence makes out a "specification of writings," which he requires to be produced. An act and commission (commission), or a remit, is granted to a competent person to take the deposition of the havers.

[5] The same, and a mere fishing diligence is not allowed.

[6] *Contra;* the party may get a diligence to recover writings in the hands of a third person, or to examine him as a haver, as easily as against the opposite party, or as easily as such third party can be compelled to be a witness at the trial.

of such pleading. He is not, however, bound to deliver the deed itself to the officer of court, either at the time of his pleading[1] or before trial.[2] If the opposite party wants to see the document before trial, he may, in general, apply for an order to inspect it, but he must show that it is material to his case. If he want to have it produced at the trial, he must, before trial, serve a notice to produce[3] it on the party holding it. On the other hand, the party having possession of documents, which he does not wish to incur the expense of proving at the trial, may throw such expense on the opposite party, by serving the latter with a notice to admit them, which notice describes the documents, and states where they may be inspected, and if after this they are not admitted, and the party is obliged to call witnesses to prove them, the expense of doing so falls on the party so refusing, whatever be the result of the action.[4]

1085. *Affidavits.*—In nearly every application to the court, and, in most cases, in applications to a judge at chambers in incidental or interlocutory matters, the motion must be founded on an affidavit, which is the only mode of informing the court of material facts, the statement of counsel not being sufficient.[5] An affidavit must be sworn before a judge or a commissioner (who is generally an attorney) appointed by the court for that purpose in every part of England; the master's and judges' clerks are also commissioners, but it is not

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[1] The deeds relied on, or copies, are lodged in process, *i. e.*, given in to the clerk of court, along with the party's pleading, and they are kept together by the clerk of the court. All the pleadings and documents produced in connection with them constitute what is called "the process," which often embraces many documents, and an inventory of process is part thereof. Either party may borrow the process alternately from the Register House or Office where they are kept, either to add a fresh pleading or for reference.

[2] *Contra;* he must lodge it eight days before trial with the clerk of the Register House. A. S. 16th Feb. 1841, § 19. So as to all maps, plans, etc.

[3] The notice to produce is unnecessary. See next and last two notes.

[4] A notice to admit or produce is unnecessary, as the parties must lodge before trial all documents to be given in evidence; and, moreover, witnesses in general are not required to prove deeds, for these are probative of themselves.

[5] *Contra;* an affidavit is seldom used. The agents, by consent, agree to many things, and counsel's statement at the bar, with a written petition, signed by the agent, is sufficient.

competent to swear affidavits before a justice of the peace.[1] The jurat, which is a docquet at the foot of the affidavit, states the time and place of the swearing, and by and before whom.[2]

1086. *Reference of cause of action to party's oath.*—There is no mode known to the law by which either party can stake his cause on the single deposition of his adversary, and compel the adversary to submit to oral examination on oath for that purpose; and a court of law or equity has no equitable jurisdiction to grant or sanction this kind of arbitration,[3] but the adversary may, in general, be examined as a witness at the trial, and often may be examined also on interrogatories or orally before issue joined, for particular purposes connected with the action.

1087. *Order of counsel's addresses to jury at trial.*—Until recently each counsel made his speech to the jury before calling his witnesses, and had often no opportunity afterwards of addressing the jury. But each counsel now merely opens the case, in the first instance shortly giving an outline of the facts, and reserves his comments and

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[1] *Contra;* before any justice of the peace or magistrate; and a justice of the peace may act out of his county or in England. *Kerr* v. *Marquis of Ailsa*, 26 Sc. Jur. 525; 1 Macq. Ap. 736.

[2] So the affidavit states the same in the body of it.

[3] *Contra;* this is competent and usual, called the oath of reference, which in many cases is used as a last resource when other proof is wanting. *Adam* v. *Maclachlan*, 9 D. B. M. 576; *Ritchie* v. *Mackay*, 3 W. S. 490; *Pattinson* v. *Robinson*, 9 D. B. M. 226. The party claiming to refer requires leave of the court, but it is never refused except on strong grounds. *Ibid.* Even where the party has succeeded in his evidence and got a verdict of a jury, he can be put to this oath before decree is extracted. *Sheriff* v. *Sheriff's Trustees*, 15 S. D. 115. The party referring the matter may, before oath is emitted, retract it, on payment of costs, if the other party is not placed in a worse position. Shand Pr. 396; *Jamieson* v. *Wilson*, 15 D. B. M. 414; *Chalmers* v. *Jackson*, 18 Feb. 1810, F. C. If the oath or deposition is obscure, re-examination may be ordered, and the court interprets it. *Gifford* v. *Rennie*, 15 D. B. M. 451. Where the oath is qualified, *i.e.*, the deposition is evasive and explanatory, much litigation arises as to what effect is to be given to it, and how far the qualification is extrinsic or intrinsic, *i.e.*, requires to be supported by collateral evidence or not. If the party fails to emit the oath, or refuses to answer specific questions, without cause, he is held as confessed. *Murray* v. *Murray*, 1 D. B. M. 484; but generally may be reponed (*i.e.*, restored or let in) on payment of expenses, if he apply promptly. Ersk. 4, 2, 17; *Miller* v. *Cooper*, 13 S. D. 369; see also *ante*, § 481.

attacks on his opponent's case until after the evidence on both sides is concluded. The mode in which counsel address the jury at a trial is shown more briefly in the following table than can be stated in words, P being plaintiff and the party who begins, and D being defendant:—

Where D. calls no Evidence.	Where D. calls Evidence.	Where D. calls Evidence, and P. has Evidence in reply.
P. open.	P. open.	P. open.
Evidence.	Evidence.	Evidence.
Sum up.	D. open.	D. open.
D. speech.	Evidence.	Evidence.
	Sum up and speech.	P. evidence in reply.
	P. sum up and reply.	D. sum up and speech.
		P. sum up and reply.[1]

1088. *Right to begin at trial.*—The right to begin at a trial is often a question of consequence, as it regulates the right of reply, and of thus having the last word with the jury. Though, in general, the plaintiff begins, yet there are several exceptions, which it is impossible to state in a short compass. The question is always settled by the judge at the trial.[a 2]

1089. *Issue controlled by pleadings.*—The object of pleadings is chiefly to come to an issue, and at the trial the relevancy of evidence

[a] As to the *onus probandi*, see Best on Evid. 714.

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[1] *Contra;* the practice formerly resembled that which prevailed in England before 1854, but now the senior counsel on both sides make their speeches after the whole evidence is closed. 13 & 14 Vic. c. 36, § 44.

[2] *Contra;* the question who is to be pursuer of the issue is always settled beforehand by the court when the issues are adjusted, and is settled on similar principles. Macf. Pr. 99.

must depend on the issue, and not on statements in the record, all of which become as it were immaterial thereafter.[1]

1090. *Witness, how compelled to attend.*—A witness is summoned to attend a trial by means of a writ of *subpœna*,[2] in the name of the Queen, commanding his attendance, under a penalty of £100; and if he is ordered to bring documents with him, it is called a *subpœna duces tecum*. If the witness refuse to attend, or say beforehand that he will not attend, he cannot be arrested and brought in custody to the court;[3] he can only be punished afterwards for not attending, either by fine or imprisonment, for contempt of court, or by an action of damages at the instance of the party summoning him. Nor can a witness who disobeyed his *subpœna* on one day of trial, be arrested and kept in prison[4] until the next or a future day, to insure his attendance. So a witness cannot be arrested and brought in custody before an examiner, commissioner, or arbitrator,[5] or a county court. If a witness is in prison, he may be brought up by an officer, under a writ of *habeas corpus* granted by the court.[6]

1091. *Witness leaving the country.*—Where a witness is about to leave the country before the trial, the court will grant a rule to examine him before trial;[a] but he cannot be arrested beforehand, and kept in custody merely because it is alleged that he is about to

[a] 1 W. IV. c. 22, § 4.

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[1] This is still disputed by the court, notwithstanding dicta of the House of Lords to the contrary. *Morgan* v. *Morris*, 30 Sc. Jur. 686; see also *ante*, § 1073*n* (8).

[2] By letters of diligence. There may be a first and then a second letter of diligence issued. The first is a mere citation; but the second contains a warrant to apprehend the witness.

[3] *Contra*; by letters of second diligence. *Fraser* v. *Nichol*, 2 D. B. M. 1254; Macf. Pr. 113; *Collins* v. *North British Bank*, 13 D. B. M. 541. The practice is to issue letters of first and second diligence both at once, leaving it in the discretion of the party, if the witness will not attend voluntarily, to arrest him. To enable the party to put the second letter of diligence in operation, the expenses must first be tendered. But this procedure is seldom used in civil causes.

[4] *Contra*; unless he find caution to appear. Alis. Pract. 397; Bell's notes, 262.

[5] *Contra*; the court interpones its authority in like manner on application of the arbiter, etc.

[6] So a warrant to produce the prisoner may be obtained. *Menzies* v. *Barry*, 4 S. D. 829.

abscond[1] in order to avoid giving evidence. When once the rule is granted, and the day fixed and notice given to attend, he can only be punished for not attending, like other witnesses.

1092. *Witness's privilege from arrest.*—When a witness *bona fide* attends in obedience to his *subpœna*, he is privileged from arrest upon any civil process *eundo, morando, et redeundo*, and he requires no special writ of protection from the court,[2] such protection being incident to his discharge of the public duty.[a]

1093. *Aged and sick witnesses.*—Where a witness is so old or otherwise permanently infirm or sick as to be unable to attend the trial, the court will grant a rule to have his evidence taken before an examiner.[b 3] A rule for an examination before an examiner, however, will not be granted merely because the evidence of a particular witness is vitally important, unless he is so ill or infirm that he could not attend the trial.[c 4] Unless in very urgent cases, the court will not grant this rule at a stage in the cause before issue joined.[d 5] The examinations are only admissible at the trial on proof of death or

[a] *Meekins* v. *Smith*, 1 H. Bl. 636; *Spencer* v. *Newton*, 6 A. & E. 623; *Magnay* v. *Burt*, 5 Q. B. 393.

[b] 1 W. IV. c. 22, § 4.

[c] 1 W. IV. c. 22, § 4.

[d] *Mondel* v. *Steele*, 8 M. & W. 300; *Finney* v. *Beasley*, 17 Q. B. 86; *Martin* v. *Hemming*, 10 Exch. 478.

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[1] *Contra;* and this is also competent in criminal cases. 2 Hume, 375; Alis. Pract. 399; see *ante*, § 976 *n.*

[2] *Contra;* the witness requires a special writ of protection to prevent his apprehension, and this writ is obtained only after cause shown, and it defines a certain period for the protection. Ersk. 4, 3, 24; Stat. 1663, c. 4; 1681, c. 9; 1698, c. 22; A. S. 1 Feb. 1676; 59 Geo. III. c. 35, § 28; Paton, 14 S. D. 679; *M'Culloch* v. *Babington*, 14 D. B. M. 172. If a judge grants the writ, except under these statutes, he is liable, as a cautioner, for the witness's debts.

[3] If the witness is above seventy, though not infirm, the party can, as a matter of course, get a commission addressed to a commissioner, to take his deposition. *Forbes* v. *Smith*, 11 Mar. 1820, F. C.; A. S. 11 July 1828, § 117; Watsons, 8 S. D. 261; A. S. 16 Feb. 1841, § 17.

[4] *Contra;* this has been frequently allowed. *Copland* v. *Bethune*, 5 S. D. 272; *Malcolm* v. *Stewart*, 7 S. D. 715.

[5] *Contra;* any time after execution of the summons, M. 12,091; *Carlton* v. *Strong*, 1 Murr. 29; and sometimes before, A. S. 11 July 1828, § 117; but the deposition is not always admissible if witness is still alive. *Watson* v. *Glass*, 15 S. D. 753; see *Ewing* v. *E. Marr*, 14 D. B. M. 314.

permanent infirmity, or absence abroad,[a] unless the other party consent.

1094. *Foreign witnesses.*—Where a witness resides in a foreign country, the only way in which he can be examined is under a commission addressed to some person there, but there is in that case no power to compel his attendance, unless the law of the foreign country permits it. By statute, a witness in the British dominions may be compelled to give evidence as to foreign suits;[b] but in suits pending in England, if the witness resides in any of Her Majesty's dominions, he can only be examined by commission, or a mandamus may be obtained from a court of common law in England addressed to the local judge or court, in which latter case only the witness's attendance can be enforced.[c 1] A witness in Scotland may be compelled to attend a trial in London, or at the assizes, if his evidence is material.[d]

EVIDENCE.

1097. *Hearsay evidence.*—The statements of deceased persons who, if alive, might have been witnesses, are not admissible in evidence, except in a few cases,[2] such as where the statement was made against the deceased's interest, or was what is called in criminal cases a dying declaration, or was in a question of disputed pedigree, etc. In questions of pedigree, the evidence is only received if the deceased witness was a member of the family or connected by marriage or relationship with the family whose pedigree is in dispute.[e 3]

[a] 1 W. IV. c. 22, § 10.
[b] 19 & 20 Vic. c. 113.
[c] 13 Geo. III. c. 63; 1 W. IV. c. 22.
[d] 17 & 18 Vic. c. 82.
[e] *Johnson* v. *Lawson*, 2 Bing. 86; *Doe* v. *Davies*, 10 Q. B. 314.

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[1] *Contra;* there is no power by way of mandamus to command a colonial court to examine witnesses; the only mode is a commission, and therefore witnesses cannot be compelled to attend before the commissioner, unless some colonial law compels attendance.

[2] *Contra;* there is no exception, the rule being, that hearsay evidence as to the statements or conversations of a person who is deceased, but who would, if alive, have been admissible as a witness, is received. The reason given is, that the evidence is the best in the circumstances, and there is no reason to suppose the statement was improperly made. Bell's Pr. § 2259; *E. Fife* v. *Fife's Trustees*, 1 Mur. 95; Hunter, 2 Swint. 1; *Smith* v. *Bank of Scotland*, 5 S. D. 98. See also *ante*, § 986 *n.*

[3] *Contra;* he need not be a member of the family. *Ibid.*

1098. *Handwriting.*—It is competent in civil trials, in order to prove the handwriting of a particular document, to give in evidence other documents proved to be written by the alleged writer, and the jury may form their opinion as to the point in dispute.[a] [1]

But it is not competent in criminal trials to submit such evidence to a jury, nor to give authentic writings in evidence, merely for the purpose of their being compared with the disputed document.[b] [2]

It is doubtful, in criminal cases, whether skilled witnesses will be allowed to give evidence as to handwriting merely from a comparison with other writings admitted to be genuine.[c] [3]

1099. *Unstamped documents at trial.*—If a document is produced at a civil trial unstamped, but of such a nature that it may be stamped after execution, the party tendering it may pay the stamp and penalty to the associate or officer of court, and the objection to its inadmissibility will be thereby removed.[d] [4]

1100. *Bill of discovery.*—Where a person has an interest in a deed which is in the custody of another, there is no form of action at law to compel the latter to give a copy; [5] but if an action is pending with reference to which the deed is material evidence, the court will grant a rule calling on the party having the possession to grant inspection or a copy. And in a court of equity a bill of discovery will lie for the express purpose as an independent suit.

[a] C. L. P. Act, 1854, § 27.
[b] Morgan's case, 1 M. & Rob. 134 (*n*); *Griffiths* v. *Williams*, 1 Cr. & J. 47; *Griffits* v. *Ivery*, 11 A. & E. 322.
[c] *Doe* v. *Suckermore*, 5 A. & E. 703.
[d] C. L. P. Act, 1854, § 28, 29.

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[1] The same. *Gellatly* v. *Jones*, 13 D. B. M. 961.

[2] *Contra*; it is equally competent as in civil cases. *Paul* v. *Harper*, 10 S. D. 494; Alis. Pract. 413; but see Robertson, Sh. Just. C. 186; M'Gale, *ibid*, 194.

[3] They are admitted, but discountenanced. 2 Hume, C. L. 395; 1 Alis. Pract. 411; Hunters, 2 Swint. 14.

[4] There is no such power in the officer of court, but the court will postpone the case. *Harvey* v. *Miller*, 7 D. B. M. 398; or grant a new trial, *Wallace* v. *Gray*, 14 S. D. 541; *Ivison* v. *Edin. Silk Co.*, 8 D. B. M. 236.

[5] The party has an action of *transumpt* for the purpose of obtaining an authenticated copy, which is chiefly used where the deed is not recorded in a register. M. 2456; M. 12,447; Ersk. 2, 3, 43. So in course of a suit, the court grants diligence to recover writings. So an action of exhibition may be raised if the object is merely to see the document.

Evidence.

1101. *Lost deeds and writings.*—Where a deed or writing is lost, or cancelled by mistake, the only suit for the purpose solely of establishing or declaring the contents thereof, as near as possible, apart from other relief, is a bill in a court of equity to obtain the benefit of such deed or writing.[1] And, if a party is sued, or otherwise suffers injury from the loss, and cannot protect himself in a court of law, he may file a bill in a court of equity, and obtain entire relief. In some cases secondary evidence is allowed in courts of law, on proof of the original being lost. In actions on lost bills of exchange, secondary evidence is only allowed when the party sued and setting up the loss gives an indemnity.[a 2] The court of equity, in taking the evidence, may send the case to a jury, though this is seldom done, but it generally delegates the duty to its own Examiner, if the witnesses are within the jurisdiction.[3]

1102. *Document in third party's hands.*—Where a document belonging to A is possessed by B who will not give it up, A can bring an action of trover, or of detinue, or both against B for the document, and the document itself, and not merely damages, may thus be obtained.[b 4] Where a sight of a deed in the hands of a stranger is merely required by one having an interest, and there is

[a] C. L. P. Act, 1854, § 87; *Charnley* v. *Grundy*, 14 C. B. 608.
[b] C. L. P. Act, 1854.

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[1] By an action of *proving the tenor*. He can institute the suit at any time; but in many cases he may also, by way of exception, *i. e.*, defence or incidentally, prove it by secondary evidence where it is not the foundation of his right. *Drummond* v. *Thomson's Trustees*, 7 W. S. 564; see also *Merry* v. *Dun*, 14 S. D. 36; *Dow* v. *Dow*, 10 D. B. M. 1465; *M. Bute* v. *Cooper*, 5 S. D. 831; 4 W. S. 335. If no third party has any interest, the lieges are made defenders. *Mitchell* v. *The Lieges*, 14 D. B. M. 932.

[2] *Contra;* an action of proving the tenor may be raised if a special *casus amissionis* can be set forth. See *M'Farlane* v. *M'Nee*, 4 S. D. 509.

[3] So it is not sent to a jury; Ersk. 4, 1, 58; Shand's Pract. 840; but generally to a special commissioner. *Anderson* v. *M'Conochie*, 5 D. B. M. 496; *Boyter* v. *Rintoul*, 6 W. S. 394.

[4] An action of exhibition and delivery is the action by which the owner or joint-owner of a document recovers it from third parties. *L. Craufurd* v. *Campbell*, 2 W. S. 440. In the Sheriff Court a summary petition to the sheriff is competent. *M'Kirdy* v. *M'Lachlan*, 2 D. B. M. 949. If an action is pending, a diligence against havers may be had for the purpose of the action.

no action pending, a bill for discovery must be filed in the Court of Chancery.[1]

1103. *Actions against carriers, etc.*—In actions against carriers and others for the loss or destruction of goods, where it is necessary to prove the quantity or value of the goods, the plaintiff gives his evidence as in other cases; but it is entirely for the jury to say whether his single evidence is sufficient without corroboration, and there is no artificial rule or presumption on the subject.[2]

1104. So in actions for goods sold and delivered, embracing a variety of articles, the plaintiff may prove the quantity by stating generally that all the goods contained in the account were furnished, and the amount, and it is for the jury to say whether this with any other corroborative evidence is sufficient.[3]

1106. *Groundless actions or defences.*—It is not competent either for a plaintiff or a defendant in any cause to call upon the other to take an oath that he has a good ground of action or defence, and no court can stay proceedings until this is done.[4] But in making some incidental applications to the court for favour, an affidavit is often required of a good ground of action, or defence as the case may be, before the favour will be granted.

1107. *Tradesmen's books.* — Tradesmen's, and other business

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[1] An action of exhibition simply. Ersk. 2, 5, 3; M. 3960, *et seq.*; *Clerk* v. *Mitchell*, 4 S. D. 102; *Fisher* v. *Bontine*, 6 S. D. 330.

[2] The pursuer used to be allowed to give his oath *in litem*, which was held conclusive proof, though uncorroborated by another witness, as the general rule requires. Since trial by jury, and since parties are admissible as witnesses, this kind of oath is seldom resorted to, though still competent. See 16 Vic. c. 20; *Gowans* v. *Thomson*, 6 D. B. M. 606; *Cracour* v. *St. George Steam Co.*, 5 D. B. M. 10. Such an artificial test flourished chiefly where the court decided issues of fact without a jury.

[3] Since in general two witnesses are required, if the pursuer eked out an imperfect or *semiplena probatio* with an oath in supplement, it was held quite sufficient evidence of furnishings. Ersk. 4, 2, 14; M. 12,728; *Lawson* v. *Fairie*, 5 Deas & A. 307; *Balfour* v. *Sharp*, 11 S. D. 784; *Duguid* v. *Mitchell*, 1 W. S. 203. This eking out with an oath was also allowed as a special favour in suing the putative father of a bastard for aliment of the child. See *Hill* v. *Fletcher*, 10 D. B. M. 7; *Mason* v. *Forest*, 12 D. B. M. 1090.

[4] *Contra*; this can be done by means of the oath of calumny, which is however nearly obsolete. See *Paul* v. *Paul*, 7 Mar. 1855, 16 D. B. M.

men's books, though apparently regular, are not admissible in evidence in favour of the tradesman, though they are admissible against him.[1]

1108.—*Attorney's examination of his witnesses.*—The attorney examines the witnesses previous to the trial, in order to ascertain what they can attest, and though he has collected them all in one room, and taken down the statement of each in presence of the rest, this will be no ground for rejecting [2] the witness, though the proceeding may be a subject of observation to the jury, if found out by the opposing counsel.

1109. *Impeaching witness's credit.*—The character of a witness may be impeached on cross-examination by asking him whether he has been convicted of a felony or misdemeanour. And if he deny or refuse to answer the question, evidence may be given [3] of the fact by putting in a certificate of the conviction.[a] But this proof of the conviction is allowed to be given only in trials of civil cases.[b]

The credit of a witness may also be impeached in the cross-examination by calling his attention to a contradictory statement or writing made by him at another time.[c] [4] This rule, however, only applies to civil actions.[5] A witness's credit may also be impeached by the opposite party calling persons to prove that the witness was unworthy of belief, and that they would not believe the witness on his oath.[d] [6]

[a] C. L. P. Act, 1854, § 25.
[b] *Ibid.*
[c] C. L. P. Act, 1854, § 23, 24.
[d] *R.* v. *Rookwood*, 13 How. St. Tri. 210; *R.* v. *Watson*, 32 Id. 495.

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[1] *Contra;* a tradesman's books are evidence in his own favour; and where there is no trial by jury, they amount to *semiplena probatio*, and are aided by an oath in supplement. Ersk. 4, 2, 4; *Hutton* v. *Buckmaster*, 15 D. B. M. 574.

[2] *Contra;* the witnesses have been rejected altogether on this ground, as being an attempt to tutor them. *Duncan* v. *Thomson*, 12 S. D. 935; *Reid* v. *Duff*, 5 D. B. M. 656. So in criminal cases. Lindsay, 2 Hume, 379; and now see 15 & 16 Vic. c. 27.

[3] *Contra;* no evidence can be given of the fact if denied. 2 Hume, 353; Alis. Pract. 445.

[4] The same by 15 Vic. c. 17, § 3.

[5] *Contra;* the rule applies also to criminal trials. *Ibid.*

[6] *Contra;* a witness's credibility cannot be impeached on cross-examination by evidence, that he or she is a person who cannot be believed on oath, unless in the case of a prosecution for rape, or assault with intent to ravish the witness. 2 Hume, 352; Alis. Pract. 527; Bell's notes, 254.

A witness cannot be asked in cross-examination whether he ever committed a particular crime.[1]

1110. *Discrediting one's own witness.*—A party cannot discredit his own witness by general evidence of bad character, yet he may contradict him by calling other witnesses, or, by leave of the judge, may prove that the witness has made inconsistent statements, provided the occasion is first stated, and the witness has denied doing so.[a 2] But this is only allowed in civil actions.[b]

1111. *Child a witness.*—A child may be a witness, in both civil and criminal cases, if he has sufficient intelligence and has some understanding of the nature of an oath. The child, however, where admitted, must first take the oath.[c 3]

THE JURY.

1112. *Jury not agreeing.*—The jury must be unanimous in their verdict.[4] When the jury retire to deliberate as to their verdict, they are not in general allowed refreshments, and only with leave of the judge. If, after being long enclosed, they cannot agree, the only course is to discharge them, and the trial becomes abortive.[5]

[a] C. L. P. Act, 1854, § 22.
[b] *Ibid.*
[c] 1 Leach, C. C. 199; *R.* v. *Perkin*, 2 Mood. C. C. 139.

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[1] *Contra.* Burke's case, Syme, 364; Pendar's case, 1 Swint. 25; Johnston's case, 2 Brown, 401. The witness may be asked if he has committed a particular crime, which affects his credibility, as perjury, theft, etc.; but if he has not been convicted of the crime, no proof of the fact is allowed, and the witness is told by the judge he is not bound to answer.

[2] There seems no authority to the contrary. *Manuel* v. *Fraser*, 1 Murr. 390; *Smith* v. *Puller*, 2 Mur. 346; *Keddie* v. *Christie*, 11 D. B. M. 150.

[3] *Contra;* a child under twelve or fourteen is seldom sworn, but is allowed to make a declaration, if intelligent. 2 Hume, 341; Alis. Pract. 433.

[4] *Contra;* if, after being kept three hours in deliberation, nine or more of the jury agree on a verdict, such verdict is taken as the verdict of the jury. 22 & 23 Vic. c. 7, § 1.

[5] *Contra;* if, after being enclosed six hours, the jury, or nine of them, cannot agree, the judge is entitled to discharge them, and generally does so. 22 & 23 Vic. c. 7, § 2. And the judge may allow the jury refreshment. 17 & 18 Vic. c. 59.

INCIDENTAL PROCEEDINGS.

1113. *Discontinuance, nolle prosequi, nonsuit.*—If the plaintiff find that he has a bad case, he may discontinue the action.[1] This may be done at any stage before verdict or judgment; but it must be with leave of the court, and on paying costs of the defendant.[a] The discontinuance does not prevent the plaintiff bringing a fresh action,[b 2] nor does it stay proceedings, unless costs are paid.[c] If the proceedings are at the stage of a jury trial, the plaintiff may, before verdict, consent to a nonsuit, which does not preclude him from commencing a fresh action. If the plaintiff wish to abandon part of his cause of action, he may enter a *nolle prosequi* as to that part, or as to one or more pleas. Or he may enter a *nolle prosequi* as to the whole cause of action. If he does so before judgment, he is not prevented from bringing a fresh action.

1114. *Security for costs.*—Where a plaintiff permanently resides abroad, or out of the jurisdiction, he is bound, if the defendant make application, to give security for costs. Thus a person residing in Scotland is so bound. And it makes no difference that the plaintiff has real property situated within the jurisdiction, unless such property is accessible to execution.[3] The name of the surety does not appear in the record, the proceedings being merely collateral.[4] The surety

[a] *Pott* v. *Hirst*, 1 D. & L. 910; Rule Pr. § 23; H. T. 1853.

[b] *Molling* v. *Buckholtz*, 3 M. & Sel. 153.

[c] *Beeton* v. *Jupp*, 15 M. & W. 149.

IN SCOTLAND.

[1] So the pursuer may, on payment of defender's costs, abandon his action by a minute of abandonment on similar terms.

[2] The same. 6 Geo. IV. c. 120, § 10; A. S. 11 July 1828; *Muir* v. *Barr*, 21 Sc. Jur. 139.

[3] So if a pursuer is abroad, the defender can insist that a mandatary be sisted in the process; and the rule is, that the mandatary need only be in the same rank of life as the pursuer, though insufficient to meet costs. If the pursuer is a proprietor of lands in Scotland, he cannot be called on to sist a mandatary.

[4] *Contra;* the mandatary is sisted (made a party) in the process, and the summons is generally in the joint names of the pursuer and his mandatary. Yet it lies on the defender to object that there is no mandatary.

gives a bond to the defendant, and if the parties cannot agree as to the amount, the master of the court settles it. A defendant cannot be called on to give security for costs,[1] unless in the few cases in which he is an actor or *quasi* plaintiff.

1115. *Judgment of non pros.*—Where the plaintiff neglects at any stage of the cause to proceed according to the rules of the court, the defendant may obtain judgment of *non prosequitur* against him for his costs.[2] Thus, if the plaintiff fail to declare, to reply, etc., in due time, the defendant obtains this judgment, which, however, does not prevent a fresh action being brought. If after issue joined, the plaintiff neglects to go to trial, the defendant can force him to do so by giving him twenty days' notice to try, otherwise judgment; or he may himself take the record for trial by proviso.

1116. *Issue without pleadings.*—The parties may, immediately after the summons is issued, by consent, agree, without any pleadings, to try by a jury certain questions of fact, if an action would lie.[3] So they may agree to state questions of law in the form of a special case.[4] A judge may also, by consent of the parties expressed in writing, try issues of fact without a jury.

1117. *Defendant giving warrant of attorney.*—When the defendant wishes to compromise the action, having no defence, but yet being unable to pay the sum due at once, he may, if the action has already commenced, grant a *cognovit*, which is a consent to judgment being entered up against him if he should fail to pay in a certain

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IN SCOTLAND.

[1] *Contra;* a defender, as well as a pursuer, can be made to sist a mandatary, if he reside abroad, and, as already stated, it is often competent to sue a defender in Scotland, though living abroad.

[2] So the defender can obtain protestation against a pursuer for not calling the summons, for not enrolling, etc., and he can obtain extract protestation for his costs, subject to the right of the pursuer to be reponed within ten days thereafter on consigning the protestation money. 13 & 14 Vic. c. 36, § 23.

[3] *Contra;* there is no power in the Court of Session to entertain and decide questions of fact stated in the form of an issue, without a record having been first made up; there must at least be summons and defences, and the record closed.

[4] *Contra;* there is no mode by which the court can decide questions of law stated by parties without a record.

Judgment.

time given to him, and which time is set forth in an agreement, called a defeasance, written on the back of the *cognovit*. If no action is commenced, but is contemplated, the debtor may give his creditor a warrant of attorney, which has the same effect as a *cognovit*;[1] or after action the defendant may consent to a judge's order to stay proceedings on payment of the debt.[1] In the above circumstances, the plaintiff or creditor can sign judgment, and issue execution immediately.

Every *cognovit* and warrant of attorney must be attested by an attorney who attends expressly to explain the nature and effect of the instrument.[a] And if a trader make or consent to these, or to a judge's order within two months before his bankruptcy, they are void; and they are also void if not registered within twenty-one days after their date.[b]

JUDGMENT.

1118. *Signing judgment.*—Fourteen days after the verdict, the successful party can sign judgment and issue execution,[2] but the judge at the trial may grant a certificate to stay execution or for speedy execution, thereby putting off or hastening the execution, as the case may be. If, however, a new trial be moved for, and a rule *nisi* granted, this suspends the execution, if it has not issued, or if it has issued and the rule for a new trial be made absolute, the execution is set aside and the party restored to all he may have lost thereby. Judgment may be signed at once, after a demurrer has been disposed of, and execution may be issued forthwith. If, however, a suggestion

[a] 1 & 2 Vic. c. 110, § 9, 10. [b] 12 & 13 Vic. c. 106, §§ 135, 136.

IN SCOTLAND.

[1] This effect is, in practice, produced in all cases where the defender has given a bond or other deed, with a clause of registration for execution, or a bill of exchange for the amount, on any of which securities execution can be had, without any action at all, by summary diligence. In other cases the defender often dispenses with the *inducice* (accepts service), and allows decree to go against him.

[2] The party extracts the decree (*i.e.*, gets an office copy of it), which contains a warrant for execution, and in this way diligence is executed. 1 & 2 Vic. c. 114.

of error be served on the party before the writ of execution, it is a supersedeas of execution—that is, the writ cannot be executed.

1119. *Registering judgments.*—Though no hold can be obtained by the plaintiff on the defendant's lands until final judgment, yet, when judgment is signed and execution issued thereon, it may be immediately registered in the Court of Common Pleas. This is done by leaving with the master a memorandum or minute containing the name, trade, and abode of the defendant, the date of the judgment, and the amount of the debt and costs, which particulars he enters in his book. The effect of this registration is to affect with notice all subsequent purchasers, mortgagees, or creditors, and to render the debt a charge on the lands.[1] To maintain its validity, however, the judgment must be re-registered every five years, and the writ of execution must also be registered against the debtor, and put in force within three months thereafter.[a] Decrees and orders of a court of equity, and rules of a common law court for the payment of money, may also be thus registered.

Charging Government stock.—Moreover, when judgment is signed, and the debtor has any Government stock, funds, or annuities, or any stock or shares in any public company, standing in his name, or in the name of any person in trust for him, a judge may make the judgment debt a charge on such stock;[2] but no proceedings to take the benefit of such charge can be taken till six months from the date of the order.[b]

1120. *Attachment of debts.*—Until final judgment is signed, the creditor, who sues his debtor, is in general helpless as regards secur-

[a] 1 & 2 Vic. c. 110, § 19; 2 & 3 Vic. c. 11; 3 & 4 Vic. c. 82; 18 & 19 Vic. c. 15; 23 & 24 Vic. c. 38; 27 & 28 Vic. c. 112. [b] 1 & 2 Vic. c. 110, § 14.

IN SCOTLAND.

[1] *Contra;* a decree of the Court of Session cannot be registered so as to operate like a bond and disposition in security, or as a real burden on the debtor's lands. It requires another process, which is partly an action and partly a diligence, called an action of adjudication, to secure a similar effect. But as stated, *post*, § 1134 *n*, the creditor may, before or after decree, expede inhibition, which will prevent the debtor making any voluntary disposition of his heritable property. *Malcolm* v. *Mansfield*, 6 Bell's Ap. 359.

[2] *Contra;* though a judge has no power to make such an order, there is a much ampler remedy in the creditor to arrest similar funds, which can be done contemporaneously with the raising of the action.

ing any of the debtor's goods against alienation in the meantime. In other words, until that stage there can be no attachment by the judgment creditor of debts due to the defendant.[1] Much less can a creditor, whose debt is payable *in futuro*, attach the goods or debts due to the debtor before decree.[2] But after signing judgment he may find out what debts are owing to the judgment debtor by obtaining a rule or order for his oral examination before the master of the court or other person. The judge then may grant an order calling on the garnishee[3] to show cause why he should not pay the judgment creditor[4] the debt. The service of this rule or order on the garnishee binds the debt in the garnishee's hands.[5] He must then, if he does not dispute the debt, pay the same into court,[6] or the judge may order execution to issue against him, without any further action or process.[7] If, however, the garnishee dispute the debt, then the judge will only allow the judgment creditor

IN SCOTLAND.

[1] *Contra;* arrestment may be had at any time before or after decree, and generally is used at the commencement of the action. By this process the creditor obtains a hold of the debts due to the debtor by third persons, or goods in their hands, by executing letters of arrestment (serving the garnishee with a rule *nisi*). The arrestee cannot after this notice pay away the fund to the common debtor. Goods or monies cannot in general be arrested in the arrester's own hands, but a seller of undelivered goods may now do so. 19 & 20 Vic. c. 60, § 3.

When the decree is obtained, the arrester completes his title to the funds arrested by an action of forthcoming. The action sets forth the ground of debt due to the pursuer, the arrestment that has been used, and concludes against the arrestee and common debtor to make forthcoming the sums of money or other effects arrested, at least of so much as will pay the sums due by the decree. The arrestee can only defend the action on showing some informality in the arrestment, or that he has no funds in his hands. When moveables have been arrested, the court orders them to be sold, and the price paid to the arrester. Shand's Pract. 575.

[2] *Contra;* a creditor whose debt is payable *in futuro*, can arrest in security, by which he prevents the funds being disposed of until he is in a position to demand payment. Bell's Com. by Shaw, 604.

[3] Called the arrestee, and the defender whose debt is arrested is called the common debtor.

[4] Called the arrester.

[5] This is called the execution of letters or precept of arrestment.

[6] He must consign the money.

[7] *Contra;* an action of furthcoming is necessary to complete the arrester's right. See *supra*, *n.* 1.

to issue a writ calling on the garnishee to show cause why execution should not issue against him, and if such cause be shown, they must go on with the proceedings in nearly the same manner as in an ordinary action. If the garnishee pay the money into court, he is discharged as against the judgment debtor, though the attachment be afterwards set aside, or the judgment on which it was founded be reversed.[1]

The process of attachment of debts was first introduced recently (in 1854), and applies generally only to debts due by third parties, *i. e.*, liquidated sums, and there are many exceptions; thus legacies and trust funds are not attachable. Goods[2] of the debtor, in the hands of third parties, are not made available by attachment, but may sometimes be reached by the creditor by a writ of fi. fa., subject to any right of the party holding possession. So choses in action are not interests, which are attachable in the above sense.[3] The custom of foreign attachment,[4] which prevails only in the city of London, properly so called, and some other places, is a more extensive right than ordinary attachment, and is available before as well as after judgment.

1121. *Costs.*—At common law neither the plaintiff nor defendant was entitled to costs, but the statute of Gloucester and other statutes have conferred and modified this right.[5] The result now is, that

IN SCOTLAND.

[1] The arrestment in security may be recalled or loosed if it is nimious, *i. e.*, oppressive or hard, but not an arrestment in execution.

[2] *Contra;* goods, as well as debts of all kinds, may be arrested in security before decree, and by an action of furthcoming after decree recovered. Trust funds, legacies, and even rents, interests, and annuities *currente termino, i. e.*, before they are payable, may be arrested.

[3] *Contra.* See last note.

[4] This is the common law of Scotland. See *ante*, § 1120, *n* 1.

[5] *Contra;* there is no general statute on the subject, costs being in the discretion of the court; and the court assumes power at common law to give either party his costs. In general the successful party is entitled to his expenses. But if he is only partially successful, these expenses are modified. Where the object of the suit is the vindication of character, or personal liberty, as in defamation, and slander, and imprisonment, the court allows the pursuer his expenses, although the jury have awarded merely nominal damages. Shand's Pract. 1028. Moreover, in all cases where the defender has, in course of the action, made a judicial tender of a sum equal to or exceeding the sum ultimately found due, the pursuer is subjected in expenses subsequent to the tender. *Ibid.*

common law courts have no control over the costs in most actions, except where a jury give a verdict for less than 40s.; in some cases also when under £5. In actions for verbal slander, if the plaintiff recovers less than 40s., he cannot get any costs beyond that sum, and no court or judge has power to give them to him.[1] In actions for assault, false imprisonment, libel, seduction, malicious prosecution, and trespass to land, if the verdict is under 40s., the plaintiff can get no costs, unless the judge certify for them, which he will do, if the injury was wilful and malicious, or the action was brought to try a right. In other personal actions, if the plaintiff recover less than 40s., he is entitled to his costs, unless the judge certify to deprive him of them. The County Courts Acts, however, considerably modify this last rule.[a]

One of the masters of the court taxes the costs, and the party can appeal to the court, by asking for a rule to review the master's taxation.[2]

EXECUTION.

1123. *Issuing execution.*—Immediately after signing judgment, the judgment creditor may, in general, issue execution, and no notice of signing judgment need be given to the debtor.[3] Before issuing execution, however, the judgment, postea, etc., must be shown to the officer of the court before he will stamp the writ of execution, and a præcipe must be filed by such officer.

[a] See Paterson, Mac. & Mar. C. L. Pract. 455; Marshall on Costs.

IN SCOTLAND.

[1] *Contra;* he would in general be entitled to expenses in such case.

[2] The auditor of the Court of Session audits the accounts of the parties, and his report may be complained of in like manner.

[3] *Contra;* there is an intermediate time during which the party is charged to pay, and has generally fifteen days to do so. The extract decree contains this warrant to charge, as well as to arrest and poind. 1 & 2 Vic. c. 114. The messenger then executes this charge in presence of a witness. If, at the expiration of the days of charge the money is not paid, then the extract and execution are presented to the keeper of the General Register of Hornings at Edinburgh, who records it. Another officer, called the clerk of the Bill Chamber, grants a warrant to imprison, if asked for. The debtor can then be imprisoned, and his goods poinded or arrested.

Execution.

1124. *Execution of writs by bailiff.*—While all writs of summons, and all pleadings, notices, etc., in the action, are served by the attorney or his clerks, or any other person, it is otherwise with writs of execution, which must be executed by bailiffs or sheriff officers, under the authority of the sheriff of the county, a ministerial officer appointed annually.[1] It is the duty of the sheriff[2] to execute these writs, and he or his under-sheriff may do so personally, without any further warrant, after delivery to them of the writ. But, in general, all the writs are executed by the bound bailiffs, *i.e.*, persons who bind themselves by bond to the sheriff, with sureties, and the sheriff is responsible for all illegal acts done by them under colour of their authority. When a bailiff executes a writ of execution, his authority is derived from a warrant to execute granted by the sheriff to the individual bailiff. If, however, the party requires it, the sheriff will grant such warrant to any other person nominated by such party, and such person is then called a special bailiff, for whose acts the sheriff is not responsible. The sheriff or his bailiff can only execute the writ within the particular county or division or city for which the sheriff acts.[3] The courts have no direct control over the bailiffs,[4] but deal with the sheriff in a summary way when there is any irregularity. So third parties never sue the bailiff, but look to the sheriff only, who has his recourse against the bailiff on his bond.[5]

1125. *Concurrent writs of execution.*—The judgment creditor cannot execute all the writs of execution concurrently, *i.e.*, he cannot both imprison the debtor and take his lands and goods at the same

IN SCOTLAND.

[1] *Contra;* these in general, as well as warrants to poind, etc., must be executed by messenger-at-arms in presence of a witness.

[2] The Sheriff is the county court judge, or judge ordinary, and does not ministerially execute writs; these are executed by a separate body of officers called messengers-at-arms, under the control of the Lord Lyon.

[3] *Contra;* the messenger-at-arms has the run of all Scotland, and is not confined to any particular county.

[4] *Contra;* the court directly controls the messengers-at-arms, and may deprive them of their offices for malversation.

[5] *Contra;* third parties sue the messenger and cautioners in the Lyon Court, or in the Court of Session, who, however, can only decern against the latter to the extent of their bond.

time.[1] He must make his election. The general rule is, that imprisonment is a satisfaction of the debt, unless the debtor die in prison, or escape, or be rescued; and hence, after that kind of execution the creditor cannot seize his goods and lands also.[2] Again, where a writ of execution against the real estate has been executed, the debtor's person or personal estate cannot be taken.[3] But after taking the personal estate, either the person or the real estate may be taken.

THE WRIT OF CA. SA.

1126. *Execution against the person.*—The writ of execution against the person is called a writ of *capias ad satisfaciendum* or ca. sa.[4] The bailiff having obtained a warrant from the sheriff to execute the writ, goes and arrests the debtor anywhere, and at any time except on Sunday. If he is a sworn and known bailiff, he need not show his warrant or writ; but if not a known bailiff, he must do so, if the party demand it, and in all cases he must state the contents of the writ at the time of arrest. It is in general necessary that the bailiff should touch the debtor, however slightly, to make the arrest valid.[5]

1127. *Bailiff cannot break outer doors.*—In executing the writ, the bailiff cannot by force break open the outer door of the debtor's dwelling-house, nor can any court give him such power, for an

IN SCOTLAND.

[1] *Contra;* all are concurrent diligences. The creditor can poind (execute a fi. fa.), arrest (attach debts and goods), inhibit (obtain injunction against alienation of real estate), incarcerate (execute a ca. sa.), and adjudge (execute an elegit), *unico contextu* for one and the same debt.

[2] *Contra.* See last note.

[3] *Contra.* See last note but one.

[4] A crave to imprison, formerly called letters of caption, is now written out after the expiry of the days of charge, and subscribed by a writer to the signet, and the clerk of court writes "*Fiat ut petitur*," and dates and subscribes the docquet on the extract-decree, as already stated.

[5] *Contra;* the messenger must always show his warrant and his baton, and touch the debtor with his wand of office, whether requested or not.

Englishman's house is his castle against all ordinary writs of execution for debt.[1] Hence in executing such writs, whether against the person or the goods of the debtor, the bailiffs are often kept at bay for a great length of time. Any stratagem, however, for effecting a peaceable entry, is lawful, and the dexterity and tact of the officer are generally in the long run rewarded, as he sooner or later effects a peaceable entry in sheep's clothing. When once within the outer door, whether by trick or otherwise, the bailiff may break open the inner doors or break his way out; also, if the debtor take refuge in a third party's house, the outer door of the latter may be broken open to seek him, for the house of a third party is not privileged.

The debtor cannot be arrested in the Queen's presence, or in the verge of the royal palace, or in the Tower in London, or in courts of justice. But no systematic protection under this head is now afforded to debtors.[2]

1128. *Spunging-house.*—When the prisoner is arrested he may be immediately taken to the county gaol, but in practice he is generally taken, in the first instance, to the bailiff's house, called a lock-up house, to allow him to communicate with his friends.[3] He is afterwards taken to the gaol.

1129. *Prisoner sick or without funds.*—If the prisoner is sick, he is not removed, but only watched until he is sufficiently recovered to be removed to gaol. When a prisoner becomes sick, this is no

IN SCOTLAND.

[1] *Contra;* the warrant always gives power to open shut and lockfast places, and the court can confer such power, called the Queen's keys, which enables the messenger to break open the outer door, after demanding and being refused peaceable entrance. Even a sheriff (county court judge) can grant this power, as a matter of course, to the officer. *Scott* v. *Letham*, 5 Bell's Ap. 105. Hence "a Scotchman's house is not his castle."

[2] The privilege of "sanctuary" is wider and more systematic. Near the Palace of Holyrood a record is kept of those who resort there for such protection and take lodgings within the precincts; and the bailie of the abbey, who holds his office from the heritable keeper of the abbey, grants the debtor a certificate. The debtor is only protected for twenty-four hours, unless he gets this certificate. If the debtor is insidiously drawn or kept out of the sanctuary, the creditor taking this unworthy advantage is not allowed to profit by it. Bell's Com. by Shaw, 1086.

[3] The messenger is also entitled to take him to gaol, but in practice takes him first to a private house to allow an opportunity of compromise.

ground for discharging him,[1] but, under the Prison Regulation Acts, care is taken of his health, consistently with his detention, or, if necessary, the sheriff is ordered by the court to take him out under surveillance. In no case is the execution creditor[2] bound to maintain his prisoner, though the latter has no funds of his own, all such prisoners being maintained by the county rate.[3] Nor does the creditor, on lodging the writ of ca. sa., require to deposit a sum with the sheriff for necessaries.

1130. *Escape of prisoner.*—As already stated, if a prisoner is allowed to go out of prison for a moment, without the consent of the execution creditor, the debt is satisfied and he cannot be retaken, the only redress being against the sheriff.[a 4]

THE WRIT OF FI. FA.

1131. *Execution against the personal estate.*—The writ of execution by which the personal estate of the debtor is seized is called a writ of *fieri facias* or fi. fa.[5] The writ is executed like the ca. sa.,

[a] *East India Co.* v. *Haynes*, 12 Moore, P. C.

IN SCOTLAND.

[1] He is liberated on a bill of health or a sick bill, but may be retaken to prison on convalescence. To procure this sick bill, the certificates of medical persons are required.

[2] The creditor incarcerator.

[3] *Contra;* after notice to the creditor to pay aliment, the prisoner, if without any funds of his own, and having none supplied by the creditor, is entitled to his discharge. This is called the benefit of the *Act of Grace.* Stat. 1696, c. 32; 6 Geo. IV. c. 62. Yet when aliment is not lodged, or is exhausted, though the prisoner is entitled to liberation, he is not discharged from the debt, but may be reincarcerated. Crawford, 11 Mar. 1836; *Denovan*, 7 D. B. M. 398. This privilege is not confined to those debtors who are imprisoned for debt strictly so called, but extends to debts *ex delicto.* But persons imprisoned for not doing an act within their own power are not entitled to it. The amount of aliment is three shillings Scots (3d.) as a minimum. The creditor can afterwards claim reimbursement of this aliment. Moreover, no jailor is authorized to receive a person for civil debt unless a deposit of ten shillings is left with him for the prisoner's aliment. 6 Geo. IV. c. 62; Bell's Com. by Shaw, 1079.

[4] *Contra;* this would not be so.

[5] Called a warrant to poind, now contained in all extract-decrees.

by the sheriff giving a warrant to the bailiff, who cannot break open the outer doors[1] of the debtor's house, but requires no witnesses to be present. The bailiff may seize bank-notes, bills of exchange, deeds, and securities for money.[2] Where several creditors issue a fi. fa.,[3] the sheriff executes that which is first delivered to him, *i.e.*, he pays the debt of the first writ that came to his hand, though both came on the same day and before execution.

1132. *Mode of selling goods seized by bailiff.*—The mode in which an execution proceeds is this: The bailiff, on entering the house, seizes part of the goods in the name of the whole, and he or his assistant remains and sleeps on the premises[4] (called the man in possession), until he can remove to the sheriff's warehouse sufficient goods to pay the debt, and he has a reasonable time allowed for so removing them. No sworn appraiser needs to value the goods,[5] but the sheriff is liable in damages for removing more goods than are necessary, and practically the bailiff is always skilled in valuations. The wearing apparel, bedding, and tools of trade, not exceeding £5 in value, are privileged from being seized. The sheriff sells the goods, either privately or by auction, for a fair price; if they remain on his hands for want of buyers, the creditor can, by serving him with a writ of *venditioni exponas*, force him to sell them for what they will fetch. The creditor cannot, in that event, insist on delivery of the goods to himself, though he may purchase them at a fair price from the sheriff. There is no fixed time for the sheriff to execute the

IN SCOTLAND.

[1] *Contra;* he may break open outer doors, and the diligence is executed by a messenger-at-arms, and two witnesses are required. 1 & 2 Vic. c. 114, § 32.

[2] Debts (choses in action) cannot be poinded, but may be arrested.

[3] *Contra;* all creditors concurring in the poinding share rateably.

[4] He leaves the house, but takes an inventory or schedule of the poinded effects. 1 & 2 Vic. c. 114, § 24.

[5] *Contra;* this is necessary. The goods were formerly adjudged to the creditor by the messenger-at-arms, on appraisements by two valuators chosen by the creditor, once at the place where they were poinded, and once at the market cross. But now one appraisement only is necessary, and the goods remain in the hands of the debtor, with a schedule stating their appraised value. The messenger then reports the execution to the sheriff, who grants warrant to sell the goods by public roup.

writ of fi. fa., further than that the time must be reasonable.[1] Goods of the debtor in the hands of third parties may be seized under the fi. fa., if they can be taken without trespass, and always subject to such third party's right of lien, if any.[2]

1133. Out of the proceeds of the sale of the goods the sheriff must pay not more than one year's, one quarter's, one month's, or one week's rent already due to the landlord, according as the house is let by the year, quarter, month, week, or other term; it being the general rule that no rent is due until the end of the year, quarter, month, or week, unless it is stipulated to the contrary.[3]

THE WRIT OF ELEGIT.

1134. *Execution against the real estate.*—There is, as already stated, no mode of securing a creditor against the debtor's alienating his real estate, to the disappointment of the creditor's intended action or suit, there being no execution by way of security or anticipation until judgment has been signed, whether the debt be a liquidated sum or not.[4]

1135. When, however, judgment is signed, it may be registered,

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IN SCOTLAND.

[1] The proceeding is described with more certainty in 1 & 2 Vic. c. 114.

[2] They may be arrested in security, and by an action of furthcoming their value may be recovered by the creditor.

[3] The landlord's hypothec sufficiently protects his right for the rent due and also rent for the current term, and gives him priority over the creditor.

[4] *Contra;* the creditors may expede letters of inhibition, which may proceed on any liquid document of debt, or concurrently with the raising of an action, and which, on being executed (*i.e.*, served) and registered in the Record of Inhibitions, restrain the debtor from executing any deed, alienating his heritable estate, to the prejudice of such creditor. It is merely a negative, not an active right. The inhibition creates a double prohibition. It is executed against the debtor by delivering a copy personally, or leaving it at his dwelling-house, or if he has none, at the office for edictal citations. As against the public, after registration, it annuls sales or alienations to third parties. Not only are creditors whose debts are already due entitled to use inhibition, but those whose debts are payable *in futuro*, are also entitled to use inhibition in security if the debtor is *vergens ad inopiam*. Bell's Com. by Shaw, 928. The inhibition may, on petition to the Court of Session, be recalled if nimious and oppressive, and if the debt is not yet due, or upon the debtor giving caution; but it cannot be recalled if the debt is already due. *Ibid.* 935.

and if execution be issued and registered, it becomes, *ipso facto*, a charge on all the real estate of the judgment debtor. The writ of execution must, however, be enforced in three months, and the execution be re-registered every five years. The charge is, in effect, a statutory mortgage of the lands, and the creditor becomes a mortgagee thereof; and he may at once obtain an order of the Court of Chancery to sell and pay himself; but other creditors in a like situation may come in and share.[1]

1136. The creditor may also, if the debtor is entitled to Government stock, or shares in public companies, obtain an order of a judge to charge such stock,[2] thereby having the effect of constituting the creditor a mortgagee, but he cannot make the charge effectual until six months thereafter.

1137. *Elegit.*—Until final judgment is signed, therefore, there can be no execution against the real estate, nor can the power of the owner be interfered with by any ordinary process of law. The only writ of execution against the real estate in use is the writ of elegit.[3] In form the writ includes also the personal estate or

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IN SCOTLAND.

[1] *Contra;* a mere decree is not a *debitum fundi*, but adjudication must be added, which is partly an action and partly a diligence. See *n.* 3 below.

[2] *Contra;* this is not necessary, because the creditor can at any time arrest all debts, legacies, etc., due to the debtor, and also his chattels, either before or after judgment.

[3] The process is adjudication, which may proceed immediately after decree. Moreover, adjudication in security, *i.e.*, where the debt is future, and not yet payable, is allowed when the debtor is *vergens ad inopiam*, or there are other creditors also adjudging.

Adjudication may be raised not only on a decree, but also before decree on any liquid document of debt like a bond or a bill. Bell's Com. by Shaw, 944. By adjudication all the heritable estate of the debtor may be taken, and this includes leases and heritable securities (mortgages). Moreover, where the debtor is an heir of entail in possession, and the entail secures the estate against adjudication, the creditor may adjudge his liferent right and interest therein. Whenever the summons of adjudication has been executed, and the defender has been cited, litigiosity (*lis pendens*, which requires in E. to be registered, to take effect) commences, which puts a stop to the acts of the debtor until decree is obtained. The creditor's title is completed by recording within sixty days an abbreviate of the adjudication in the Register of Abbreviates of Adjudications. But the creditor cannot sell or acquire the property for ten years. See next note.

goods of the debtor, except oxen and beasts of the plough, and thus involves a fi. fa., but in a fi. fa. the goods are sold to pay the debt, while in an elegit, as will be seen, they are merely pledged.

1138. *How executed.*—The mode of executing the elegit is this: The sheriff, after receiving the writ, empanels a jury, without any notice to the debtor, and the creditor gives evidence, which need be very slight, to show that the lands and goods belong to the debtor. The jury then put a certain value on them, and the sheriff then executes an inquisition, which sets forth what he has done, and describes the lands and the estate of the defendant therein, and delivers legal possession of the lands. The debtor can then recover the actual possession by an action of ejectment, if he cannot otherwise enter and take possession.[1]

1139. The creditor thus becomes the tenant by elegit, but he is not the absolute owner of the lands. He merely holds them as a mortgagee, and pays himself out of the rents, and is bound, when he has so paid himself, to redeliver the lands to the debtor. If the rents are insufficient to pay the debt, the only way in which the tenant by elegit can procure the estate to be sold, and thereby his whole debt to be satisfied, is by applying to a court of equity, like any other mortgagee, for an order of foreclosure or by filing a bill for a foreclosure, and for obtaining this foreclosure no particular period is fixed. The tenant by elegit must, in such a case, account with the debtor. If the tenant by elegit has paid himself his debt, the debtor can recover back his land by an action of ejectment, or a *scire facias ad rehabendam terram*, or he may file a bill in equity.

The creditor, who first lodges the elegit in the sheriff's hands, is entitled to be paid his debt in full out of the lands, in preference to any other creditors, who issue elegits immediately after.[2]

IN SCOTLAND.

[1] So in adjudication the lands are adjudged to the creditor, *i. e.*, he is entitled to enter into possession, and if he continue ten years in possession without payment, he can raise an action of declarator of expiry of the legal (foreclosure), and after decree his right becomes absolute.

[2] *Contra*; every creditor who obtains decree of adjudication within year and day from the date of the first decree of adjudication which is recorded, is entitled, by statute, to share equally with the first adjudger. Bell's Com. by Shaw, 959.

ABSCONDING DEBTORS.

1140. *Bail and arrest.*—Where a debtor is about to abscond or leave England, and the creditor intends to sue him, the latter may, on making an affidavit of debt or damage above £20, obtain an order of a judge of the superior courts to arrest the debtor,[1] and a writ of capias, in the name of the Queen, addressed to the sheriff, issues for that purpose. The action must either be already commenced or about to be so. The debtor, on the arrest, must either pay to the sheriff the debt, or enter into a bail-bond, with sureties,[2] who undertake that special bail shall be put in within eight days, and the special bail are discharged on rendering their principal at any time during the action. Any foreigner, whether travelling on business or pleasure in England, may be arrested in this manner, though he has no residence in England, and whether his intention is to defraud his creditors or not.[3]

1141. A warrant to arrest absconding debtors may also be granted in like circumstances, in country districts, by a judge of any county court or commissioner of bankruptcy,[4] but the action must be brought, not in the county court, but the superior court.[a] The judge's order or warrant is obtained on an affidavit by the creditor.[5]

1142. *Action must have commenced.*—The action must have been commenced, *i.e.*, the writ of summons must have been issued, before a judge will grant the order;[b] but a county court judge may issue his warrant before action brought, provided the action be commenced within seven days thereafter.[c 6] The capias is the writ, which, on

[a] 14 & 15 Vic. c. 52. [b] 1 & 2 Vic. c. 110, § 3.
[c] 14 & 15 Vic. c. 52.

IN SCOTLAND.

[1] So in cases of *meditatio fugæ*, a warrant to apprehend may be obtained on debts above £8 : 6 : 8.

[2] So the debtor must give caution *judicio sisti*, the cautioner being discharged on producing his principal.

[3] *Contra;* if there is no intention to defraud his creditors, and the foreigner has no domicile in Scotland, he cannot, it seems, be arrested; but there are cases to the contrary. Bell's Com. by Shaw, 1089.

[4] The sheriff, or even a justice of the peace, can grant the warrant.

[5] By petition and oath.

[6] *Contra;* it is enough that the creditor asks the judge to ordain the debtor to find security to abide the result of any action to be raised within six months thereafter. MacCallum, Hume, 405; Gorman, 3 Feb. 1827.

Absconding Debtors.

being lodged with the sheriff, must be executed by the latter or his bailiff within a month, and with reasonable diligence.[a] The capias cannot be executed on a Sunday,[1] or within the verge of the Queen's palace. So as to the warrant to arrest. The defendant, when arrested, cannot be committed to gaol until twenty-four hours after such arrest, but the bailiff is bound to keep him until he give bail to the sheriff, or deposit the amount of the debt.[2] But the defendant does not require to be taken after arrest before the judge who made the order or issued the warrant, nor has the judge any power to inquire into the *bona fides* of the creditor or the truth of the affidavit on which the arrest was made.[3] The defendant can, however, if privileged from arrest, apply on that ground to a judge of the superior court to be discharged. If the creditor has, on false affidavit or maliciously, procured the arrest, the debtor has an action of damages for malicious arrest, or he may indict the creditor for perjury.

1143. *Debtor, when arrested.*—The debtor, when arrested, must either deposit the amount of the debt and £10 for costs with the sheriff, or find bail to put in special bail,[4] *i.e.*, he executes a bail-bond to the sheriff, with two sureties, with a condition that he will, within eight days, put in special bail, *i.e.*, find other sureties to pay the debt and costs, or render up the defendant to the Queen's prison. The bail are released[5] by rendering the principal. The sheriff is liable to an action at the instance of the prisoner if he do not accept

[a] 1 & 2 Vic. c. 110, § 4.

IN SCOTLAND.

[1] *Contra;* the warrant to apprehend a debtor *in meditatione fugæ*, being considered *quasi* criminal, may be executed on Sunday. M. 8554.

[2] *Contra;* see next note.

[3] *Contra;* the defender must be taken before the sheriff or magistrate before being committed to prison, and the judge then examines him, and he inquires, if the debtor denies it, into the truth of the facts from which the intention to leave the kingdom was inferred, and admits evidence on the part of the defender. Robertson, 20 June 1812; Borthwick, 14 May 1813. The judge, if satisfied of the truth of the creditor's affidavit, then grants a warrant to commit the defender to gaol. See M. 2054; Garrioch, 17 July 1851; M'Gubbin, 22 June 1852.

[4] After the warrant to commit, caution must be found *judicio sisti, i. e.*, to appear, and abide the result of the action.

[5] The same.

sufficient bail when tendered.[a 1] On the other hand, if he accept insufficient bail, he can be made liable to the creditor, by means of some intermediate proceedings, for the debt and costs so far as not recovered.

COURT OF CHANCERY.

1150. *Courts of equity.*—Courts of equity, as already stated, may be viewed as practically exercising exclusive jurisdiction in certain classes of remedies, the main feature of which jurisdiction is its cognisance of trusts, and its granting specific performance and injunction, all which are fruitful sources of litigation.[b] Thus bills praying for relief in such circumstances assume various phases, according to the particular redress required. There are bills for an account [2] between trustee and *cestui que trust*, between partners, etc., bills of interpleader,[3] suits for administering estates of deceased persons, usually called administration suits and creditors' suits,[4] and bills of foreclosure.[5] There are also bills praying a discovery,[6] bills to set aside deeds or contracts, or to cancel or deliver them up, on the ground of fraud, mistake, etc.,[7] bills for specific performance [8] of contracts, bills or motions for an injunction,[9] bills for partition,[0] bills seeking a declaration of right.[1]

[a] 2 Saund. 61 *b*. [b] See *ante*, § 1052.

IN SCOTLAND.

[1] The clerk of court receives the caution, and is liable if he takes bad or rejects good caution. A. S. 14 June 1799.

[2] So actions of count and reckoning.

[3] Actions of multiplepoinding.

[4] Action of ranking and sale; action of judicial sale; application to appoint a judicial factor; also action of multiplepoinding.

[5] Action of judicial sale; if the pursuer has a decree of adjudication, then it is an action of declarator of expiry of the legal.

[6] Actions of exhibition, also actions of transumpt, according to circumstances; also in course of any other action a diligence to recover documents will be granted.

[7] Actions of reduction, actions of reduction-improbation.

[8] Action of implement, which, however, is generally coupled with an alternative conclusion for damages.

[9] Petition for interdict to the sheriff, and a note of suspension and interdict to the Court of Session.

[0] Action of division.

[1] The action of declarator, which is often raised for the purpose of declaring a right without any other immediate relief.

Suit in Chancery.[a]

1152. *Filing a bill in Chancery.*—A Chancery suit is commenced by filing a bill or a claim, or taking out a summons,- the latter modes being adopted only in a few of the simpler cases. The bill contains a succinct statement of the material facts on which the plaintiff relies, divided into paragraphs, ending with a prayer for specific relief, and also for general relief.[1] Formerly, part of the bill used to be called the charge, *i.e.*, certain imaginary defences supposed to be set up were suggested, and then charges were stated rebutting these. The bill is in the form of a petition. It, as well as subsequent pleadings, require to be signed by counsel. The bill is printed on paper of a certain size and type. It is filed by taking it to the Clerks of Records and Writs.[a]

1153. *Service.*—After the bill is filed, the next step is to serve the defendants,[2] which is done by giving a stamped copy of the bill to each personally, or, if the defendant is keeping out of the way, leave may be obtained for substituted service, as by serving his attorney, or leaving it at the defendant's residence. The service is effected by the solicitor's clerk or any other person,[3] and the defendant must appear in eight days. If the defendant, after being duly served, will not enter appearance, the plaintiff may, after a certain time, enter an appearance for him.[4] Within eight days after defendant's appearance, the plaintiff prepares and files with the Clerk of Records and Writs his interrogatories, being certain questions which the defendant is required to answer.

1154. *Plea, answer, etc.*—Within twelve days after appearance the defendant must consider whether he will demur to the bill; or defend by plea, *i.e.*, by setting forth other facts which displace the effect of those stated by the bill, as by alleging a release; or whether

[a] See generally Daniell's Chancery Practice; Drewry's Chancery Practice; Smith's Chancery Practice.

IN SCOTLAND.

[1] So the condescendence which is annexed to the summons is numbered and in paragraphs, but the conclusions of the libel or decree required by the party form part of the summons. See *ante*, § 1072 *n.*

[2] This is called the execution of the summons. See *ante*, § 1069 *n.*

[3] *Contra;* by a messenger-at-arms, or officer of the court from which the writ has issued. See *ante*, § 1069 *n.*

[4] *Contra;* no appearance is entered by the pursuer for the defender, but a decree in absence will be obtained. See *ante*, § 1071 *n.*

he will defend by answer, *i.e.*, by giving the discovery required, and adding any additional facts favourable to himself, which is the usual form.[1] If the defendant demurs, the plaintiff may either submit to the demurrer and obtain leave to amend his bill, or either party may set the demurrer down to be argued. The court, in disposing of the demurrer, allows it or overrules it. The demurrer is generally for want of equity, for want of parties, or for multifariousness. If the defendant defend by plea, either party may set it down for argument, and it is thereupon allowed or overruled. The court may order the plea to stand for an answer. If the plaintiff wish to dispute the facts contained in the plea, he must reply to it as if it were an answer. The most usual course is for the defendant to defend by answer; after which he can in turn file interrogatories for the examination of the plaintiff. The body of the answer is divided into paragraphs, in the same manner as the bill, and the earlier part consists of answers to the interrogatories.[2]

1155. *Defendant failing to answer.*—If the defendant fail to answer, there are three ways of proceeding. The plaintiff may issue an attachment against him, which the sheriff will execute by arresting him and bringing him to the bar of the court to answer his contempt.[3] A motion is then made, failing any proper excuse, to commit him to the Queen's prison. If he still refuse, and is in custody, a writ of *habeas corpus cum causis* is sued out, under which writ he is again brought up, and if he continue contumacious, the bill is taken *pro confesso* against him.[4] Or if the plaintiff can do without discovery,

IN SCOTLAND.

[1] There is only one name, that of defences, containing answers to the pursuer's paragraphs, with a separate statement of all that the defendant can say in his own behalf. Certain defences are known as pleas to the relevancy (demurrers), and the rest have no special name. All the pleas, both dilatory and peremptory, are pleaded together, the Lord Ordinary disposing first of the former. See *ante*, § 1073 *n.*

[2] The defender first answers the pursuer's condescendence, and then states substantively his own defence. See *ante*, § 1073 *n.*

[3] A caption or warrant to apprehend is not issued against a defender for not lodging defences, but it is otherwise, if he fail to produce documents, or refuse to be examined as as a witness, etc.

[4] So decree in absence will be obtained against the defender. See *ante*, § 1071 *n.*

he may file a traversing note, which has the same effect as if the defendant had filed a full answer traversing the whole bill. If the defendant cannot be taken under the attachment, but has appeared, the bill may, after notice, be taken *pro confesso* against him. Or if the sheriff cannot find him, an order is applied for, that the serjeant-at-arms do take the defendant, after which, an order for a sequestration is made, by means of which certain commissioners therein named are commanded to enter the lands and seize the goods of the defendant.• The sequestrators are officers of the court, and keep the funds of the defendant till he clear his contempt.

1156. *Production of documents.*—Either party may apply to the judge for an order for an affidavit and production of documents in his possession; also for an affidavit and deposit of documents.[1] And the parties may, by agreement in writing, make mutual admissions, with a view to save more formal proof at the hearing. Either must serve the other with notice to produce the originals before secondary evidence can be given.[2]

1157. *Cause at issue.*—The plaintiff, after answer, has several courses to follow. He may amend his bill,[3] for which leave is given, as a matter of course. He may except to the sufficiency of the answers. He may set down the cause to be heard on bill and answer.[4] He may give notice of motion for a decree. He may file a replication.

But usually when a complete answer and discovery have been obtained, the plaintiff files a replication within four weeks from the answer, *i.e.*, he denies generally the truth of the defendant's answer, thereby putting him to the proof thereof. The cause is then

IN SCOTLAND.

[1] So either party may obtain a diligence to recover documents which are not lodged in process. See *ante*, § 1083 *n.*

[2] Documents are produced, as a matter of course, by either party founding on them, and they are lodged in process and kept by the clerk of the court, who lends out the process to either party at discretion as required. An inventory of process marks and identifies the various documents used. See *ante*, § 1084 *n.*

[3] So, as a matter of course, the pursuer gets leave to revise his condescendence if he thinks it necessary. See *ante*, § 1074, 1080 *n n.*

[4] So the parties may close the record on summons and defences. See *ante*, § 1077, *n* 3.

said to be at issue.[1] Each party next prepares to examine witnesses. The witnesses are examined either orally before the examiner in Chancery or by affidavit. Where a witness has been examined by affidavit, he may afterwards be cross-examined orally. Particular witnesses may be examined by special order on interrogatories. When the evidence is closed, the plaintiff must, within four weeks, set the cause down for hearing, otherwise the defendant may do so, or get the bill dismissed for want of prosecution.

1158. *The hearing.*—When the cause is set down for hearing, the plaintiff also serves the defendant with a subpœna to hear judgment. The hearing is as follows: The plaintiff's senior counsel states the nature of the case, and that certain facts will be proved, and then argues on the assumption of those facts. The junior counsel then reads parts of the answers and of the evidence on which he relies. The defendant's senior and junior counsel do likewise, and then the plaintiff's senior counsel replies.[2] Some causes are set down to be heard as short causes, *i.e.*, where no argument is necessary, but the nature of the case and the questions alone are stated.

When the evidence is conflicting, or the equitable relief depends on the legal rights of the parties which are uncertain, the court may direct an issue to be tried by a jury in a court of law, or order an action to be brought there; and in some cases the court of equity itself may summon a jury and assess damages.

1159. *Decree.*—Decrees are preliminary or final, *i.e.*, inquiries are either directed, or the subject matter is finally exhausted.[3] The former are the more numerous. When the decree is preliminary, one party has the carriage of the decree, and, by notice, fixes a day for settling the minutes, *i.e.*, for settling the terms of the decree, which is done by agreement of the parties. If they do not agree, they apply to the court to have the cause "spoken to on the minutes," when the judge will vary the decree, if he thinks necessary. The decree is then passed and entered by the registrar affixing

IN SCOTLAND.

[1] The record is closed. See *ante*, § 1077 *n.*

[2] The junior counsel for the pursuer begins, then the opposite junior; then the senior counsel of the pursuer, then the senior of the defender. Any documents can be read by the counsel for the party during the argument.

[3] So interlocutors are preliminary or final.

his signature to it in the presence of the parties. It is then enrolled if it is desired to appeal to the House of Lords, but otherwise enrolment is not necessary. Enrolment prevents any rehearing by the same court, the only remedy then being a bill of review. To guard against too speedy enrolment, a caveat may be entered by the other party.

1160. *Enforcing decrees.*—A decree cannot be enforced until it has been personally served. Every decree must state the time within which the party, after such service, must do the act ordered. If he fail to do it at the time ordered, the plaintiff may issue a writ of attachment against him, which is executed by the sheriff. If the defendant is taken under this writ, and still refuses, a commission of sequestration may be issued against his estate and effects.[1] If the defendant cannot be found, a commission of sequestration may also issue, or an order for the serjeant-at-arms. If the decree ordered the defendant to pay money then within one month from its date, the plaintiff may sue out a *fi. fa.* or *elegit*, as at common law. A decree or order directing the defendant to pay a sum of money may also be registered in the Court of Common Pleas, so as to bind the defendant's lands.[a] A decree which orders accounts to be taken, etc., is carried out by the chief clerk in the Vice-Chancellor's chambers.[2]

1161. *Claims and summonses in Chancery.*—A suit may be instituted by claim, as well as bill, though this form of proceeding is seldom resorted to; it is competent in several of the more ordinary and simple cases. No answers are put in to a claim, but evidence is gone into at once, and fourteen days after service the evidence must be completed. There is also a mode of obtaining the opinion of the court by trustees and executors in the form of a special case.[3]

1162. A still more summary mode of instituting a suit is by a

[a] See *ante*, § 1119.

IN SCOTLAND.

[1] So a decree cannot be enforced without first charging the debtor to pay or do the act. See *ante*, § 1123 *n.*

[2] This is done generally by means of a remit to an accountant, who enters into the accounts, hears parties, and then reports to the court.

[3] Not known.

summons from the judge's chambers, whereby, without either bill or claim or any answer, the defendant is ordered to show cause why a certain order should not be made. This order has the effect of a decree, and in all other respects the subsequent proceedings are the same as those under a decree. The proceeding by summons is confined to the simplest cases.

CHAPTER III.

COUNTY COURTS.

1166. *Origin and officers of county courts.*—County courts, having a petty jurisdiction, anciently existed in England, but practically their action had ceased, and there were no local civil courts, worthy of the name, until 1846.[1] In that year the present county courts were created, and England was divided into districts for the purpose. The limits of their jurisdiction do not coincide with those of the county,[2] but are defined by statute. There is one judge to each court, but if the Lord Chancellor should appoint two to one court, as he has power to do where the business requires it, there can be no appeal from one of these judges to the other.[3] The judge, who must be a barrister of seven years' standing, is prohibited from general

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IN SCOTLAND.

[1] The sheriff courts have existed for centuries, and have an extensive jurisdiction, having of late years questions in bankruptcy, as to servitudes, and other rights, added to its powers. The sheriff is also a criminal judge, and tries prisoners for the minor crimes.

[2] *Contra;* there is one sheriff court for each county, but the court may have one or two places of sitting, each presided over by a sheriff-substitute.

[3] *Contra;* there is one principal judge called the sheriff, and one or two substitutes called sheriff-substitutes. One sheriff acts for two counties in some cases. There is always an appeal from either of the sheriff-substitutes to the sheriff, and it is expeditious and cheap, but there is no re-hearing or re-argument after the final interlocutor of either of these judges.

practice at the bar.[1] The registrar of the court, generally a local solicitor, is not prohibited from general practice, but must not practice in his own court.[2] There is also a bailiff[3] attached to the court, whose duty is to serve all the writs, notices, etc., necessary in the course of the suits.

1167. *Jurisdiction.*—Though the general jurisdiction is confined to cases under £50, yet the parties may, by consent, give jurisdiction in cases where any higher amount is claimed. But the court has no jurisdiction in cases where title to land comes in question, or in cases of seduction and similar cases, unless the parties expressly consent thereto.[4] And parties living more than twenty miles from the court are not obliged to sue in such court, but may resort to the superior court.[5]

The jurisdiction of the county court extends to nearly all actions of contract and damages where the sum sought to be recovered does not exceed £50. The jurisdiction is concurrent with the superior courts in those cases, where a sum between £20 and £50 is sought to be recovered. In cases below £20 in contracts, and £5 in torts, though the jurisdiction of the superior courts is not, strictly speaking, excluded, yet it is practically so, for a party successfully suing there when he could sue in the county court, runs the risk of losing entirely his costs in the superior courts.[6]

1168. *Control of superior courts over county courts.*—If the county court judge exceed his jurisdiction, a prohibition[7] may be applied for

IN SCOTLAND.

[1] *Contra;* the sheriff-depute can practise at the bar in all cases arising between parties not in his county. The sheriff-substitute must reside in his local district, and cannot practise.

[2] The sheriff-clerk is similarly restrained.

[3] So the sheriff appoints a number of officers who execute the summonses and writs from his court.

[4] The sheriff court has no jurisdiction in questions involving the right to heritable property, in actions of declarator and of reduction, etc., but it has jurisdiction in possessory actions (as ejectment.)

[5] Persons in any part of Scotland, as well as foreigners, may sue in the Sheriff Court.

[6] *Contra;* there is no limit to the amount recoverable in these cases of contract.

[7] So by advocation and suspension, or by suspension and interdict.

in the superior court. If he refuse to hear a case, a mandamus [1] may be applied for. And in some cases a certiorari [2] may be applied to remove the cause altogether from the county court, in order to its being determined in the superior court, or for the purpose of execution being had there. When the amount sought to be recovered is above £20, either party may appeal from the determination of the county court, in point of law, to any of the superior courts.[3]

1169. *Procedure in suit.*—The procedure in the county court is simple, and there are no written pleadings.[4] The plaintiff goes to the office of the clerk or registrar of court, and fills up a printed form, shortly stating the amount of the claim and the ground of it. This is called issuing a plaint. The bailiff of the court serves a copy of the plaint on the defendant.[5] If the defendant deny the debt, he need not enter any appearance, or do any thing except attend at the hearing; unless he relies on some special defence, such as set-off, infancy, coverture, the Statute of Limitations, discharge under the Bankrupt or Insolvent Courts, in which event he must give some previous notice to the plaintiff, so that the latter may not be taken by surprise. Either party, if the sum claimed exceed £5, may demand a trial by jury,[6] in which case a jury of five is summoned, and the

IN SCOTLAND.

[1] Not known; but after advocation the Lord Ordinary may remit to the sheriff to proceed.

[2] Advocation *de plano.*

[3] So there is a right to advocate causes above £25 from the sheriff court, the procedure being partly regulated by 16 & 17 Vic. c. 80, § 24, 25.

[4] *Contra;* the pleadings are written, excepting that the summons does not contain a condescendence, and a condescendence is only allowed when the case is defended, and an investigation is necessary, and resemble those in use in the Court of Session. The procedure was recently amended by the Stat. 16 & 17 Vic. c. 80. But there is a small debt jurisdiction for causes under £12, in which there are no written pleadings, and the proceedings are summary.

[5] The citation must be signed by the sheriff's officer; A. S. 10 July 1839, § 13, 139; and he must sign each copy of the libel. *Ibid.*

[6] *Contra;* there is no general system of jury trials in the sheriff courts, but they exist in a few exceptional cases. The sheriff takes the evidence himself without a jury, or remits to a commissioner to take the proof and report. But if the claim exceeds £40, as soon as an interlocutor allowing a proof *pro ut de jure* has been pronounced, either party may advocate the cause *de plano*, so as to be able to secure a jury trial in the Court of Session.

verdict must be unanimous; in other respects the proceedings, as nearly as possible, resemble those in the superior court. The party failing may apply for a new trial.

1170. *Execution.*—After judgment, the kind of execution is as follows:—As no debtor can in general be imprisoned for debt under £20, the judge generally fixes a reasonable time for the money to be paid, failing which, a writ of execution, called a fi. fa.,[1] issues to seize the goods of the debtor. If the debtor has no goods, and does not pay at the time ordered, a summons to commit him is applied for, and if the debtor do not attend and give a satisfactory account of his means, and the reason why he has not paid, he may, if it be proved that the debt was contracted fraudulently or without any reasonable prospect of his having the means of payment, be committed to prison for not more than forty days, and so on till the debt is paid by instalments or otherwise. This imprisonment is, however, no satisfaction of the debt.

CHAPTER IV.

COURTS OF BANKRUPTCY AND INSOLVENCY—ARBITRATION.

COURTS OF BANKRUPTCY.

1174. *Bankruptcy as distinguished from insolvency.*—For the purpose of administering the estates of insolvent persons in a summary manner, and dividing the same among creditors, all persons who are unable to pay their debts are divided into two classes, viz., those who are traders strictly so called, and those who are non-traders.[2]

IN SCOTLAND.

[1] Warrant to poind the goods. A warrant to imprison (*ca. sa.*) may also be obtained if the debt is above £8 : 6 : 8. 5 & 6 W. IV. c. 70.

[2] So there is also now, by the statute 19 & 20 Vic. c. 79, no subdivision of persons for the purposes of sequestration into two classes. All persons, whether traders or non-traders, are liable to have their estates sequestrated. There is, however, also a process called *cessio bonorum*, peculiarly applicable to small bankruptcies, which proceeds on the same principle as that which was acted on in the Insolvent Court in England.

Courts of Bankruptcy.

Different courts, called respectively the Courts of Bankruptcy and Insolvency, dealt with those classes. But now, though the distinction is retained for some purposes, both classes of persons are dealt with by the Courts of Bankruptcy.[a] The chief distinction between the processes of those two courts was that the trader, when discharged with a certificate by the Bankrupt Court, was entirely released from all the debts proveable against him up to that date, and could never afterwards be proceeded against on account of them; while an insolvent, when discharged, was not released from all future liability, but merely was entitled to personal protection.

1175. *Courts of bankruptcy and officers.*—For the purpose of administering the bankrupt laws, England is divided into eight districts, in each of which commissioners of bankruptcy, who are the judges, entertain petitions for adjudication of bankruptcy.[1] When

[b] 24 & 25 Vic. c. 134.

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The debtor must petition the Sheriff, or raise an action in the Court of Session, giving a list of all his creditors, stating his inability to pay them, and offering to surrender all his estate for their behoof, and praying for personal protection. He is examined before the Sheriff. The decree is a judicial conveyance of his property to the creditors, and gives him personal protection, though it does not protect future acquisitions from being appropriated by the creditors. 6 & 7 W. IV. c. 56. The court will dismiss the petition if the petitioner's debts are all foreign. Re *Shilleto*, 24 D. B. M. 848.

[1] Either the Lord Ordinary or the Sheriff within whose county the debtor resided or carried on business, has power to award sequestration. 19 & 20 Vic. c. 79, § 18. A *judicial factor* may at once be appointed, on special application, to take immediate measures to preserve the estate, but he is not a permanent officer of the court. § 16. The judge appoints a meeting of the creditors within 6 to 12 days after the deliverance to appoint a *trustee*, who is generally an accountant who makes this kind of work his business, his remuneration or commission being settled by the commissioners, subject to correction by the court on complaint of a creditor (*Burt* v. *Bell*, 1 Macph. 382), and in whom the estate of the bankrupt vests; the creditors also elect three of themselves to be *commissioners*, who advise with the trustee as to management of the estate and payment of dividends. §§ 75, 85, 125. Though the trustee is not a permanent officer of the court, but is elected by the creditors, and the Sheriff merely declares him, or, if there are several candidates, declares which of them is elected, and confirms him accordingly, yet there is a permanent officer of great practical value, called "the Accountant in Bankruptcy," whose duty it is to keep a register of all sequestrations, and

Courts of Bankruptcy.

adjudication of bankruptcy is made, the bankrupt's estate at once becomes vested in an officer of the court paid by salary, called an official assignee. The court then appoints a public sitting, at which all creditors, who have proved debts, are entitled to vote in the choice of assignees of the bankrupt's estate, generally called the creditors' assignees or the assignees in bankruptcy, who may or may not be creditors, but act gratuitously, being allowed only expenses out of pocket like other trustees.[a] The official assignee is divested of the estate when the creditors' assignees are appointed, but if the court had so ordered, he could at once sell or dispose of goods of a perishable nature, and it is still his duty to collect debts under £10.[b] The creditors' assignees now realize the estate, report to the official assignee every three months, and manage the affairs without the interference of the court, except that, in case of differences between the two sets of assignees and creditors, the court shall decide.[c] And the resolution of the majority in number and value of creditors is not to be interfered with if just and equitable.[1]

1176. *Jurisdiction of Court of Bankruptcy.*—The London Court of Bankruptcy, within whose district, or if the debts are under £300, the county court within whose jurisdiction the debtor "has resided or carried on business for six months[2] next immediately preceding the

[a] 12 & 13 Vic. c. 106, §§ 40, 139; 24 & 25 Vic. c. 134, § 108.
[b] 24 & 25 Vic. c. 134, §§ 118, 128.
[c] 24 & 25 Vic. c. 134, §§ 116-139.

IN SCOTLAND.

to take cognizance of the conduct of trustees, and enforce regularity in their accounts and proceedings.

[1] In a much more absolute sense the trustees and creditors, or their commissioners, have the entire management of the estate, and take what steps they think proper for turning it to the best advantage, without the interference or requiring the sanction of the court. But the sanction of the accountant in bankruptcy to the sale of heritable estate by private bargain is required. 19 & 20 Vic. c 79, §§ 82, 114, 115. There is also an appeal to the court open to a dissatisfied creditor. §§ 86, 169.

[2] *Contra;* it is enough to give jurisdiction to the Sheriff or Lord Ordinary, that the debtor has "resided or had a dwelling-house or place of business within a year before the date of the presentation of the petition." § 13. Residence means living for forty days within the jurisdiction. *Joel* v. *Gill*, 31 Sc. Jur. 511. If a foreigner or Englishman go to Scotland for the purpose of being there made a bankrupt, the Scotch court may, on proof that the greater part of the creditors live abroad, recal (annul) the sequestration. 23 & 24 Vic. c. 33.

time of filing the petition," has jurisdiction. But the court in London may, in all cases under £300, make orders as to where the petition shall be prosecuted.[a] The creditors have also some power in determining this matter.[b]

1177. *Dead bankrupts.*—Where an insolvent trader has died before any adjudication of bankruptcy has been made against him, it is no longer competent for any creditor to bring his estate within the administration of the Court of Bankruptcy.[1] The only course is to institute a creditor's suit for the administration of the estate in the Court of Chancery.

1178. *Acts of bankruptcy and notice to bankrupt.*—Acts of bankruptcy by a debtor are defined to be departing the realm, suffering himself to be arrested, etc.[c][2] No person is liable to become bankrupt by reason of any act of bankruptcy committed more than twelve months prior to the filing of an adjudication in bankruptcy. No notice need be given to a trader of the petition by a creditor, and adjudication must be made within three days, and is made *ex parte;* but a non-trader, whether residing in England or abroad, must be personally served with notice previous to the adjudication, or it must be shown that reasonable efforts to serve him were used and he knew of such efforts.[d][3] Publication of the adjudication is not made in the Gazette

[a] 24 & 25 Vic. c. 134, §§ 88, 94.
[b] 24 & 25 Vic. c. 134.
[c] 12 & 13 Vic. c. 106, § 67; 24 & 25 Vic. c. 134, § 70.
[d] 24 & 25 Vic. c. 134, § 70.

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[1] *Contra;* if a deceased debtor was, at his death, subject to the jurisdiction of the supreme courts of Scotland, any creditor to the amount required in other cases may, after the debtor's death, petition for sequestration of the estate. But, though such petition may be presented any time after the death, sequestration will not be awarded till after six months from the death, unless the debtor was at his death a notour bankrupt, or unless his successors (executors and heir-at-law) consent to the petition or renounce the succession. 19 & 20 Vic. c. 69, §§ 13, 15. The deceased debtor may also by mandate have authorised any person to apply for sequestration against his estate.

[2] So notour bankruptcy is defined to be insolvency, coupled with imprisonment for debt, etc. 19 & 20 Vic. c. 79, § 7. The petition for sequestration must be presented, if without the concurrence of the debtor, within four months after the debtor's notour bankruptcy, but in other cases at any time. *Ibid.* § 15.

[3] *Contra;* in all cases the court first grants warrant to cite the debtor

till seven days after service of notice thereof on the bankrupt, to admit of his disputing the bankruptcy.

1179. *Goods in the order and disposition of bankrupt.*—If the bankrupt at the time of the bankruptcy has, with the consent of the true owner, in his possession, order, or disposition, any goods of which he was the reputed owner, or of which he had taken upon himself the sale, alteration, or disposition as owner, the Court of Bankruptcy may order the same to be sold for the benefit of the creditors.[a][1] This provision is contrary to the general rule that nothing passes to the assignees except what was in the bankrupt himself.

1180. *The discharge.*—After the bankrupt has passed his last examination, a day is appointed for the order of discharge, formerly called the certificate. On such day the creditors may, on giving notice, oppose the discharge. But neither their approval nor dissent is conclusive. The commissioner exercises an independent judgment on the matter,[2] and can make the order of discharge or suspend it. When allowed, the discharge shall state the period for which it was

[a] 12 & 13 Vic. c. 106, § 125.

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to appear within a certain period, but service of the warrant may be either by delivering a copy to him in person or leaving a copy at his dwelling-place or place of business, and if he is abroad, by leaving it at the office of Edictal Citations. 19 & 20 Vic. c. 79, § 26. The period varies from 6 to 21 days. § 28. Intimation of the petition is at once published in the Gazette, and before any deliverance.

[1] A similar doctrine exists at common law, and is not an exception, for the general rule is, that the property in goods does not pass on sale, unless there is also delivery; but by 19 & 20 Vic. c. 60, § 1, if goods have been sold but not delivered, and still are in the custody of the seller, these do not pass on sequestration of the seller to his trustee. This section only applies to cases where the seller has no beneficial use and enjoyment, and is under a constant obligation to deliver the goods. *Sim* v. *Grant*, 24 D. B. M. 1033. And the doctrine of reputed ownership is still in force, except as thus limited. *Ibid.*

[2] *Contra;* the discharge of the bankrupt is entirely within the power of the creditors themselves, and if they all concur in the propriety of the bankrupt's early discharge, the Lord Ordinary or Sheriff has no option, but must pronounce a deliverance accordingly. So after the lapse of a certain time, if a certain proportion of the creditors concur, and the rest do not oppose, and finally after the lapse of two years, whether the credi-

suspended, or the sentence of imprisonment, if any.[a] There is, since 1862, no classification of discharges according to the conduct of the bankrupt.

1186. *Debtor's bankruptcy irrespective of creditors.*—A debtor may, without the concurrence of a creditor, present a petition against himself. The registrar of the court may also, without the debtor's consent, make an order of adjudication of bankruptcy against him, if a prisoner for debt.[b][1]

1187. *Scotch court auxiliary to English court.*—The Court of Bankruptcy in England may direct examinations before the Scotch Court, which will enforce its orders.[c][2]

1188. *Composition and arrangement.*—A certain majority of creditors may themselves wind up the estate under the surveillance of the court.[d][3]

THE COURT OF ADMIRALTY.

1192. *Jurisdiction of Court of Admiralty.* — The jurisdiction of the High Court of Admiralty[4] extends over all maritime injuries

[a] 24 & 25 Vic. c. 134, §§ 157-159.
[b] 24 & 25 Vic. c. 134, §§ 101, 102.
[c] *Ibid.* §§ 216, 219.
[d] *Ibid.* §§ 110, 185, 192-200.

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tors consent or not, if they do not oppose, the bankrupt will be entitled to his discharge. The trustee's report is generally acted on as conclusive. 19 & 20 Vic. c. 79, § 146.

[1] *Contra ;* it seems a debtor can only petition the court for sequestration with the concurrence of a creditor or creditors qualified. See *ante*, § 1174, as to *cessio bonorum*. There is no power in the court or its officer to sequestrate a living debtor, except at the instance in part of his creditors. 19 & 20 Vic. c. 79, § 13.

[2] So conversely as to a Scotch court. 24 & 25 Vic. c. 134, § 230 ; see also 19 & 20 Vic. c. 79, § 90.

[3] As regards trust-deeds and composition-contracts, there is no statutory provision making the agreement of a majority binding on the rest of the creditors without sequestration. 19 & 20 Vic. c. 79, §§ 35, 137.

[4] The High Court of Admiralty of Scotland, which had a jurisdiction not only over the open sea, but also in inland navigable rivers up to the first bridge (*Boettcher* v. *Carron Co.*, 23 D. B. M. 322), as a separate court, was abolished, and its jurisdiction was transferred to the Court of Session and

arising upon the seas, or in parts beyond the reach of the common law. The judge of the court has also a special commission from the Crown to adjudicate on prize of war.[1] There is an appeal to the Judicial Committee of the Privy Council.

1193. Until recently, the only counsel entitled to practise in the court were advocates or doctors of the civil law, but now the court is thrown open to all barristers-at-law.

ARBITRATION.

1198. *Agreement to refer.*—An agreement to refer a dispute to arbitration, if not in writing, cannot be enforced.[a 2] But an action will lie for not agreeing to refer.[b]

1199. *Compulsory arbitration.*—A court of common law, in actions where a matter of mere account is involved, may, either before or at the trial, compel the parties to refer the matter to an arbitrator.[c 3]

1200. *Writing.*—The agreement in writing to refer matters to arbitration need not be by deed or in the party's handwriting.[4]

1201. *Award.*—The award is usually signed by the arbitrator

[a] *Ansell* v. *Evans*, 7 T. R. 1; *Godfrey* v. *Wade* 6 Moore, 488.
[b] *Livingstone* v. *Ralli*, 5 E. & B. 132. [c] C. L. P. Act, 1854, § 3.

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to Sheriffs. 1 W. IV. c. 69; Ersk. 1, 3, 33. The causes not exceeding in value £25 are confined to the Sheriff Court in the first instance, with some exceptions. The process for one or more joint-owners, insisting on either selling their own interests or acquiring that of the others, is called a process of set and sale. Shand's Pract. 417.

[1] This jurisdiction of the old Admiralty Court in Scotland was taken away by statute, and transferred to the High Court of Admiralty of England. 6 Geo. IV. c. 120.

[2] *Contra*; if relating to moveables and if proved by a reference to oath. M. 17,013; M. 8402; M. 8476.

[3] *Contra*; there is no such power in the court.

[4] *Contra*; it must be probative or holograph; see Fernie, 3 S. D. 113; unless there is *rei interventus*.

and attested by witnesses.[1] It may be set aside on the ground of corruption or misconduct.[2]

1202. *Enforcing award.*—When the award is sought to be enforced, it is made a rule of court and summarily dealt with.[3]

1203. *Costs of reference.*—Where the submission or order of reference gives no express power to the arbitrator to give the costs of the arbitration to either party, he has no implied power to give them.[a 4]

CHAPTER V.

THE LEGAL PROFESSION.

1208. *Division of practitioners.*—The legal profession in England is divided into two great classes, viz., counsel or barristers-at-law and attorneys or solicitors.[5] These are the active members of the profession in all the courts, superior and inferior, except the Ecclesiastical and Admiralty Courts, where the corresponding division is

[a] *Firth* v. *Robinson*, 1 B. & C. 277.

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[1] The decreet-arbitral must be executed like a deed. But it has been held that an award by an English arbiter appointed by parties in Scotland is good, though not executed according to the formalities of the law of Scotland. *E. Hopetoun* v. *Scots Mines Co.* 28 Sc. Jur. 322.

[2] *Contra;* the decreet-arbitral can only be reduced by an action of reduction, and on the grounds of bribery, corruption, or falsehood. Stat. 1695, c. 25. As to what amounts to corruption, see *Miller* v. *Miller*, 27 Sc. Jur. 292. Ersk. 4, 3, 35; Parker on Arbitration, 97.

[3] So the authority of the court is interponed.

[4] *Contra;* the arbiter has an implied power to award the expenses of the arbitration. *Robertson* v. *Brown*, 15 S. D. 199; *Fairley* v. *M'Gown*, 14 S. D. 470; *Ferrier* v. *Alison*, 4 Bell's Ap. 161.

[5] The division is into advocates, and agents or law agents. This latter class is subdivided, see *post.*

into advocates and proctors, but these are now converted into barristers and attorneys respectively. There is also a very limited class called special pleaders, equity draftsmen, and conveyancers, who stand in an intermediate position.

COUNSEL.

1209. *Barristers-at-law.*—Barristers-at-law must have been entered as members of one of the four Inns of Court, viz., the Inner Temple, the Middle Temple, Lincoln's Inn, Gray's Inn. The student must keep his terms, *i.e.*, eat a certain number of dinners in the hall of his inn at certain times and seasons during twelve terms, there being four terms in each year, and he must attend certain lectures on legal subjects, or produce some evidence of professional studies, and it is now also compulsory upon him before admission to undergo an examination as to general learning, unless he is a graduate of a British university.[1] When the twelve terms have been duly kept, a petition is presented to the benchers, who have the exclusive management of the inn, for leave to be called to the bar, and on payment of the fees and stamp-duties, etc., the student is admitted and takes the oaths of the office.

1210. *Degrees of barristers.*—There are certain degrees of rank[2] amongst counsel, viz., Queen's counsel, serjeants-at-law, and barristers-at-law, the last sometimes called utter barristers. Queen's counsel wear silk gowns, and sit within the bar. Serjeants wear cloth gowns or stuff, and have precedence of barristers, and they have also sometimes patents of precedence entitling them to rank before Queen's

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[1] So there has always been a compulsory examination of advocates, both as to general learning and as to legal studies, including a knowledge of the civil law, there being two examinations, and one year elapsing between them. They are not, however, obliged to qualify themselves by eating any dinners together, and they are called to the bar before they become members of the Faculty of Advocates. The Faculty of Advocates have a widows' fund, to which each member is obliged, by statute, to contribute. Their library is one of the libraries entitled to a copy of every book entered at Stationers' Hall. The Faculty is considered a corporation, though no charter of incorporation now exists.

[2] *Contra;* there are no silk gowns except two, viz., the Lord-Advocate and Solicitor-General. The Dean of Faculty of Advocates is elected by the Faculty to be their head and to preside at their meetings.

counsel; barristers wear stuff gowns, and are hence sometimes called stuff gownsmen.[1] The Queen's counsel are generally elected benchers of their respective inns of court, but the serjeants form a separate community. By ancient custom each judge of a common law court before sitting in court is made a serjeant. The Queen's counsel attach themselves to particular courts in Chancery, but this arrangement is not acted upon in the common law courts.

1211. *Exclusive audience.*—In all the superior courts of law and equity barristers have exclusive audience, but in the inferior courts, including the Bankruptcy Court, attorneys or solicitors are allowed to plead orally and conduct cases. When a counsel is instructed to appear in court for a party, his instructions are contained in a "brief;"[2] when his opinion is merely requested on some point of law, irrespective of any pending litigation, the instructions are called a "case for opinion."[3]

1212. *Counsel for paupers.*—It is not the practice for the courts annually to assign counsel to act for those who sue in *forma pauperis*,[4] but in all the courts any one is allowed, on making an affidavit that he is not worth more than £5 in the world, and producing a certificate of counsel that he has a good cause of action or suit, to sue in *forma pauperis*, and he may have a counsel assigned to him to act gratuitously. In criminal cases there is no practice, except in cases of treason, for the court to assign counsel and attorney to prisoners who are unable to pay the fees usual to secure such assistance.

1213. *Any person may conduct his own case.*—Every person is allowed, if he choose it, to conduct his own case without either an

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[1] The counsel do not attach themselves to particular courts, but practise in all the courts indiscriminately.

[2] Called a memorial.

[3] Called a memorial for opinion.

[4] *Contra;* certain advocates, generally junior counsel, are assigned annually by the Faculty of Advocates to be advocates for the poor, and who are consulted as to pauper litigation, and report on the *probabilis causa*. In criminal cases every prisoner is entitled to have a counsel, and if no advocate for the poor is present, the court, as a matter of course, assigns a counsel to all prisoners who are unable to procure assistance.

attorney or counsel; but if he succeeds, he cannot recover any costs for his trouble, unless he is an attorney.

1214. *Senior and junior counsel.*—It is a general rule in all the courts that the senior counsel begins the argument and his junior follows.[1]

SPECIAL PLEADERS, ETC.

1217. *Special pleaders, equity draftsmen, conveyancers.*—There is a very limited class of practitioners called special pleaders and equity draftsmen, who hold an intermediate place between barristers and attorneys, and who confine themselves to drawing the pleadings in an action or suit.[2] They must take out an annual certificate, and cannot plead at the bar, though they must be members of an inn of court. Special pleaders draw pleadings in actions in the common law courts, and equity draftsmen draw pleadings in Chancery suits. As, however, counsel, and sometimes solicitors also, perform the same duties, these classes are very limited in number.

ATTORNEYS AND SOLICITORS.

1219. *Attorneys or solicitors.*—Attorneys or solicitors are all on one level as to privileges and rights, in whatever part of England they carry on business. Thus a country attorney can practise in the superior courts in London, if he take out the proper town certificate, but as he would not be allowed travelling expenses in attending to the business, he employs another attorney, called his

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[1] *Contra;* the junior always begins; then the opposite junior; then the seniors respectively.

[2] *Contra;* there is no intermediate class of practitioners, the drawing of pleadings being part of the ordinary duties of counsel and agents.

"London agent," [1] to sue out all writs and take all steps necessary in London. The attorneys do not, however, constitute a corporation, though "The Incorporated Law Society," of which many attorneys are members, act in some respects as the representatives of that branch of the profession. That society has, however, no power to strike any attorney off the roll, which must be done on motion, and is generally done at their instance, by the superior courts only. The laws relating to attorneys are consolidated in the statute 6 & 7 Vic. c. 73.

1220. *Articled clerks.*—Before a person can practise as an attorney

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[1] *Contra;* the general name is "agent." The profession consists of different bodies, viz., writers to the signet, solicitors before the supreme courts, solicitors-at-law, and procurators. The country procurators or writers practise only in the sheriff courts, and are not entitled to practise even in these beyond their own county or the adjoining counties. At Aberdeen, by ancient custom, the procurators are called advocates. The country procurators are arranged also into corporations or faculties, which are regulated on the model of the metropolitan corporations. The writers to the signet and solicitors before the supreme courts form each distinct bodies, and their members practise in the Court of Session, each having nearly the same privileges, with the exception that writers to the signet subscribe the summons or first writ issued. They are also incorporated bodies (though there is no charter extant for the W.S., and the point is not quite settled), and maintain a widows' fund. They have also each a library. Moreover, the W.S. and S.S.C., together with the advocates and judges, constitute and are members of what is called the College of Justice, the chief substantial advantage of which is that the members are exempt from some of the local taxes. There is no general statute regulating the qualifications of law agents.

The designations of writers to the signet and solicitors before the supreme courts are usually abbreviated into W.S. and S.S.C. respectively; and that of solicitors-at-law, who confine their practice to the sheriff's court in Edinburgh, is abreviated into S.L. Nearly all the W.S. and S.S.C. practise exclusively in Edinburgh, where the supreme courts are established. Hence in the country the practitioners are nearly all procurators, and must confine their practice to the local sheriff court; but as the sheriff courts have an unlimited jurisdiction in matters of contract, and foreigners can sue there, the business, especially in Glasgow and the large towns, is very great. Though the term procurator is the correct and strictly professional name, yet, in popular language, the practitioners in the country are never so designated, but they are universally known and described as "writers," which, together with the term "agent," or more properly "law agent," is the generic name for all legal practitioners except advocates.

or solicitor; he must have served under articles of clerkship, and been duly examined and admitted, and he must have also taken out an annual stamped certificate. The articled clerk must serve and be bound to some attorney for five years, or if a graduate of a university of the United Kingdom, or if a *bona fide* clerk for ten years previously to an attorney or proctor, or if a barrister, then for three years. An examination in general knowledge is necessary before admission, except where the clerk is a graduate; and an examination in legal knowledge is necessary before admission. Scotch writers to the signet, solicitors or procurators, on being articled and serving an English attorney, may be examined and admitted after three years.[a] The courts annually appoint examiners to test the competency of clerks, and the examination takes place in London.[1] When the clerk passes the examination he obtains a certificate of competency, which enables him to be admitted as an attorney. An attorney is the technical name used in the common law courts,[2] while a solicitor is that used in the equity courts; but practically the same examination serves for admission in both sets of courts, and the same person always is, or may be, both an attorney and a solicitor. After a clerk is duly admitted an attorney, he requires the usual annual stamped certificate to enable him to practise.

1221. *Partnership.*—An attorney cannot take into partnership one who is not an attorney,[3] and stringent regulations and statutes

[a] 23 & 24 Vic. c. 127; 14 & 15 Vic. c. 88; 7 & 8 Vic. c. 86; 6 & 7 Vic. c. 73.

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[1] So there has long been to some extent a general educational test in the two higher bodies, viz., the W.S. and S.S.C., for the apprentices require to have attended a university two years, and certain law lectures, and also to serve an apprenticeship for five years. There is also an educational test among the country procurators, who, however, being subdivided into different bodies, each having its own regulations, there is some variation as to the requirements.

[2] "Law agent," or more frequently "agent," is the common term used, which comprehends the whole body of practitioners, exclusive of advocates.

[3] *Contra*; this is not prohibited, though the name of the unqualified practitioner, who is always a writer or procurator, is not used in the course of practice in the supreme courts.

prohibit this, under the penalty of his being struck off the rolls. Nor can any attorney allow an unqualified person to act in his name, or act on any understanding as to dividing the profits with unqualified persons. An unqualified person practising as an attorney is, moreover, not only incapable of suing for his costs,[a] but he is liable to a fine of £50, and to be indicted for a misdemeanour.[1]

1222. *Taxation of costs.*—When an attorney is employed by a client to conduct a litigation, the former is said to be retained, and the attorney's authority is called a retainer.[2] The retainer is either in writing or verbal. Whatever business an attorney does, as an attorney, for his client, his bill of costs may be submitted by the client to taxation, on application to one or other of the courts.[3] This is allowed even after payment, within a certain time and under certain circumstances. The courts of common law have, however, no inherent power to tax an attorney's bill; it is derived entirely from statute.[b] If, after taxation of a bill of costs, more than one-sixth of the amount of the bill be taxed off, the attorney pays the costs of the taxation.[4] Moreover, no attorney can sue in any court for the amount of his bill of costs until one month after he has delivered a copy of the bill duly signed.[5] If the attorney will not deliver his bill, the client or party chargeable may apply summarily, on motion, for an order compelling the attorney to deliver it. The court or judge may now give an attorney a charge on the fund recovered in a suit to the extent of his taxed costs.[c]

[a] 6 & 7 Vic. c. 73, §§ 2, 35; 23 & 24 Vic. c. 127, § 26.

[b] *Smith* v. *Dimes*, 4 Exch. 37.

[c] 23 & 24 Vic. c. 127, § 28.

IN SCOTLAND.

[1] *Contra;* he seems not liable to be prosecuted criminally.

[2] This is called a mandate, but in practice mandates are never asked from clients.

[3] The taxation is not confined to actions in court, but may also extend to conveyancing and miscellaneous business, for the client can insist on the accounts for the latter being taxed.

[4] The rule as to this in private taxation is, that where one-third is taxed off, the agent pays the taxing master's fee.

[5] *Contra;* this is not necessary as a condition precedent.

1223. *Lien on papers, etc.*—The attorney has a lien[1] on all papers and monies of his client, which came into his hands in the course of business as an attorney, for the general balance due by the client. The lien may, however, be waived impliedly,[2] as by taking a bond or other security. The lien on a fund in court is not a general, but only a specific lien. Though, in general, an attorney or solicitor cannot prevent his client from compromising an action or suit,[a] merely because his costs may thereby be lost, still the courts will, if possible, prevent collusion between the clients, and will order the judgment or decree to stand as a security for the costs. The attorney cannot, however, sue out execution in his own name,[3] and thereby pay himself.

1224. *London agent.*—When a London attorney or solicitor acts for a country attorney or solicitor, which is, in general, necessary in conducting actions and suits in the superior courts, for otherwise the attorney would not obtain his travelling expenses to and fro, the former is technically described as the agent of the latter. There is, however, no privity between the client and the agent, for though the agent binds the client in the course of the litigation, the agent cannot, as a general rule, sue the client for his bill of costs, but must look for these only to the country attorney.[4] So the client cannot sue the agent for negligence, but can only sue the country attorney in respect thereof.[5] The agent has a lien, as against the client and all

[a] See *Brunsdon* v. *Allard*, 28 L. J. 306, Q. B.

IN SCOTLAND.

[1] The law agent, besides this lien, has a hypothec over the expenses found due in an action, which is more than a lien, or rather, is like a maritime lien, good without possession. See note (3).

[2] *Contra;* the lien must be waived expressly, and waiver is not implied from taking a bond or bill. 1 Bell's Ill. 465.

[3] *Contra;* the agent is entitled to have the decree for his client's costs extracted in his own name, thereby securing payment of his expenses. *Taafe* v. *Taafe*, 1 S. D. 319. He requires merely for this purpose to give notice to the opposite client, not to pay them. *Stephen* v. *Smith*, 8 S. D. 847. Where expenses are given or damages found due to his client, no compromise or compensation (set-off) by such client can defeat the agent's right to insist for them. *Sloss*, 2 S. D. 302; *Barr* v. *Wotherspoon*, 13 D. B. M. 305; *Miller* v. *Galls*, 10 D. B. M. 1384.

[4] So the country procurators have generally an agent in Edinburgh; but they can be sued also, as well as the client, by the town agent for expenses. See *Cullen* v. *Black*, 1 Macq. 374.

[5] *Contra.* See last note.

the world, on the papers of the client only for his costs in the individual action, and not for the general balance due by the country attorney. The agent is, in general, treated by the opposite party as the attorney in the cause, and generally divides the profits with the attorney who employs him, according to a proportion agreed upon, generally half or one-third.[1] When a London attorney requires to serve writs on persons in the country, and do other business, he generally employs a local attorney there as his agent for such purposes.

1225. *Misconduct.*—When an attorney is guilty of misconduct in the course of his profession, he can be punished by the court (and the court only), either by fine or attachment, or by being struck off the roll.[2]

1226. *Costs on sale of land, etc.*—When property is sold, or a lease is granted of land, the practice is for the vendee or lessee's solicitor to prepare the draft, and the expense of the conveyance or lease is borne by the vendee or lessee, unless there is a special agreement. So the solicitor of the mortgagee prepares the mortgage security at the expense of the mortgagor.[3]

1227. *Costs.*—Tables of fees are prescribed by the courts for each step of a litigation. In conveyancing the solicitor charges according to the number of folios, and never *ad valorem.*[4] A folio in Chancery and conveyancing consists of 90 words, and in common law of 72

IN SCOTLAND.

[1] *Contra;* this is never done; the town agent taking the whole profits, besides, in general, holding the country procurator liable for the expenses. Moreover, an agreement between them to share the profits would be *pactum illicitum*, the country procurator not being entitled, as such, to practise in the superior courts. *Gilfillan* v. *Henderson*, 6 W. S. 489.

[2] So he can be punished by a fine, or he may be deprived by the court of his right to act as an agent. There is, moreover, a jurisdiction claimed to be vested in the deputy-keeper and officers of the signet to punish the members for misconduct. The fiscal of the society prosecutes, and these officers try the party charged, and fine, suspend, or deprive him. *Writers to the Signet* v. *Graham*, 1 W. S. 538.

[3] *Contra;* the vendor and lessor in practice bear the costs equally with the vendee and lessee, and the vendor's or lessor's agent prepares the conveyance or lease. So the borrower pays for the bond, and the lender's own agent prepares the deed, unless there is an agreement to the contrary.

[4] In somes cases the agent charges *ad valorem.*

words, for which the charge is 4d. in copying, and 6d. for engrossing.[1]

ADVOCATES—PROCTORS—NOTARIES.

1232. *Advocates and proctors.*—An advocate is a counsel who practises exclusively in the Ecclesiastical and Admiralty Courts. He holds the same relative position in those courts as a barrister-at-law does in all the other courts of law and equity. So a proctor holds in the same courts the position analogous to an attorney or solicitor in the common law and equity courts. Advocates and proctors were recently put on a like footing to barristers and attorneys respectively, as regards their staple business, viz., that of the Probate and Divorce Courts respectively, to which courts the main jurisdiction exercised by the old Ecclesiastical Courts was transferred by statute.

1233. *Notaries.*—Notaries are also under the surveillance of the Ecclesiastical Courts, and obtain a license from the Court of Faculties. They must be articled for seven years. They are not numerous or much interested in litigation.[2]

IN SCOTLAND.

[1] A sheet consists of 250 words, for which the charge for extending on stamp is 2s. 6d. the first sheet, and 1s. 6d. for every other; and for copies, 1s. per sheet.

[2] *Contra;* notaries are largely interested in general business, and many procurators are notaries. Their services in conveyances of land, especially that part of the conveyance consisting of giving infeftment or sasine, are indispensable, and they still protest bills and make out instruments of protests generally, and subscribe writs in making up titles to estates, *i.e.*, in deeds transmitting the estates from the deceased proprietors to their heirs and representatives.

PART VII.

SOME POINTS OF INTERNATIONAL LAW.

CONTRACTS—REAL PROPERTY.

SUCCESSION—WILLS—INTESTACY.

MARRIAGE—FOREIGN JUDGMENTS—CAPACITY.

CHAPTER I.

SOME POINTS OF INTERNATIONAL LAW.

1239. *English court sending case for opinion of Scotch court, and vice versa.*—When in the course of an action or suit in an English court, the law of Scotland on any point material to the case required to be ascertained, it could, until recently, only be ascertained like other matters of fact by the evidence of witnesses who must have been skilled in the law. And the same course could only be taken in an action in Scotland where the law of England came in question. It is now, however, competent for a court in either country, instead of taking the above course, to direct a case to be prepared setting forth the facts, and stating certain questions of law arising out of the same, on which they desire the opinion of the other court, and to remit the case accordingly. The opinion of the consulted court is then certified, and is binding on the consulting court, but on appeal to the House of Lords the opinion of the consulted court may be reviewed.[a]

CONTRACTS.

1240. *Contracts made in either country.*—Contracts are valid, in general, according to the *lex loci*, *i.e.*, law of the place where they are entered into, and they may be sued upon in any country;[b] but if they are to be performed in another country, the law of the place of performance is to govern.[c]

1241. *Suing in England persons abroad.*—In England any action upon a contract, or for an injury to the person or personal estate,

[a] 22 & 23 Vic. c. 63. See Appendix.

[b] *Richards* v. *Goold*, 1 Mol. 22.

[c] Story's Conflict, § 242, 280.

irrespective of contract, wherever such contract was broken or such injury committed, may be brought in England, provided the defendant is within England, and can be served with process.[a] But where the action was in its nature local, as trespass to land abroad, such action will not be entertained.[b] And, in general, a defendant who is abroad or out of the jurisdiction can only be sued in England when the cause of action arose in England, and when notice of the action is served personally on the defendant.[c]

1242. *Scotchman in Scotland must be sued there.*—A Scotchman may also be sued like other foreigners, if he happen to be in England and be personally served with process. But where the defendant is in Scotland or Ireland, and has not been served with process in England, he must in all cases be sued in his own court, though the cause of action arose in England; thus a Scotchman can only be sued in Scotland and an Irishman in Ireland.

1243. *Arresting a Scotchman casually in England.*—A foreigner or Scotchman may also be arrested and held to bail in England in an action about to be brought in a court of common law in England against him, provided such foreigner or Scotchman intend forthwith to leave England. It matters not that he was only casually present in England, and was merely passing through that country on business or pleasure, and intends to return to his own domicile. It is enough that he is for the moment in England and intends to leave it. He must be committed to prison unless he give security, either by depositing money or finding bail to answer for the debt when judgment is signed. Yet if the foreigner or Scotchman were decoyed or entrapped by the plaintiff's fraud into England for this purpose, he will be discharged.[d]

1244. *Serving an Englishman in Scotland.*—But a domiciled Englishman cannot be made amenable to the jurisdiction of the Scotch court by casually passing through Scotland, and being served with a summons there, unless he has resided forty days, either in a friend's house or otherwise (which residence need not be continuous); or unless the Englishman has heritable property in Scotland; or unless the jurisdiction has been first founded against him

[a] *Mostyn* v. *Fabrigas*, Comp. 161; *Rafael* v. *Verelot*, W. Bl. 1055.

[b] *Doulson* v. *Matthews*, 4 T. R. 503.

[c] C. L. P. Act, 1854, § 17, *et seq.*

[d] *Stein* v. *Valkenhuysen*, 27 L. J. 236, Q. B.

by arresting some of his goods *jurisdictionis fundandæ causa.*

Thus mere personal service of the summons on an Englishman in Scotland, without other elements, gives no jurisdiction to the Scotch court;[a] and personal service, in questions of jurisdiction, has no greater efficacy than the usual and regular service, which is service at the dwelling-place.[b] The Scotch nativity of the defender, however, as well as the domicile of the contracting party, are considered ingredients of the jurisdiction; for though the House of Lords decided[c] that the Scotch *forum originis* of the defender did not *per se* give jurisdiction, yet the Scotch judges, in a late case,[d] still avowed an "unprincipled respect"[e] for the place of nativity, viewing it as at least an ingredient in the question of jurisdiction against a defender.[f] Where personal service in Scotland, *plus* Scotch nativity, *plus* the *locus contractus* (though the breach of contract may be out of Scotland) coexist, the Scotch court has jurisdiction.[g]

When a person, residing out of Scotland, is amenable to the jurisdiction of the Scotch court, it is not necessary to serve the defender abroad personally with any notice of the suit; an edictal citation—*i.e.*, a citation left at an office in Edinburgh (in substitution for the old practice of crying the name at the market-cross of Edinburgh, and at the pier and shore at Leith)—being deemed sufficient service. An exception, however, exists in consistorial actions—*i.e.*, suits for divorce, separation, declarator of marriage, etc.—in which case the summons must be served on the defender personally, unless it be shown to be impracticable.[h] But in England personal service or personal notice, or at least satisfactory evidence that every reasonable effort to effect personal service has been used without effect, and, in the latter case, that knowledge of the suit has come to the defendant, are, in all cases, both as regards persons residing in England and abroad, necessary both at common law and equity.[i]

[a] *Crichton* v. *Robb*, 22 D. B. M. 728.

[b] *Per* Inglis, L. J. C., *Johnston* v. *Strachan*, *infra.*

[c] *Grant* v. *Peddie*, 1 W. S. 716.

[d] *Johnston* v. *Strachan*, 33 Sc. Jur. 386.

[e] *Per* Lord Wood, *ibid.*

[f] *Johnston* v. *Strachan*, 33 Sc. Jur. 386; *Sinclair* v. *Smith*, 32 Sc. Jur. 671; *Ritchie* v. *Fraser*, 15 D. B. M. 205. But Scotch nativity, *plus* personal service in Scotland, will not alone give jurisdiction to a Scotch Sheriff-Court, for the Court of Session, and not the Sheriff-Court, is the *commune forum* for persons residing abroad. *Crichton* v. *Robb*, 22 D. B. M. 758.

[g] *Sinclair* v. *Smith*, 32 Sc. Jur. 671.

[h] 24 & 25 Vic. 86, § 10.

[i] 15 & 16 Vic. 76, § 17-19; Consol. Orders, x.

1245. *Arresting an Englishman in Scotland.* Any person, whether a foreigner or not, may be arrested in Scotland, *in meditatione fugæ*, by a foreigner on a foreign debt. And this arrest gives jurisdiction to the Scotch Court in the same way as if, not his person, but his goods had been arrested.[a]

1246. *Reconvention in Scotch Court.* Another mode by which Englishmen and foreigners may be made amenable to a Scotch Court, is by the doctrine of reconvention, borrowed from the civil law, whereby if a foreigner sue a defender in the Scotch Court, whether the Sheriff-Court or Court of Session, such foreigner is liable, during the pendency of such suit, to be sued in turn, in the Scotch Court, by the Scotch defender, in respect of other and different grounds of action, provided only these be connected with and arise out of the same subject-matter.[b] There is no such doctrine recognised as a ground of jurisdiction in England.

1247. *Arresting an Englishman's funds in Scotland.* Where A, an Englishman or foreigner, resides in Scotland, he may be sued there. But even if A is not, and never was, in Scotland, but happens to have goods or chattels, or, as a Scotch judge expressed it, "a toothpick at a penny the dozen" there; or if A has debts due to him, by persons in Scotland, any Scotch or foreign creditor, who has a claim of debt or cause of action against A, may, by merely arresting or attaching the chattels, toothpick, or debt due to A, in the hands of the Scotch debtor or custodier, called the arrestee, immediately thereafter found a jurisdiction in Scotland against A; and, without giving A any notice further than what is called an edictal citation, may commence an action in respect of any cause whatever, not connected with personal status, and obtain decree against A.[c] And the effect of this decree seems not limited by the value of the subject-matter arrested.[d]

In this way English railway, insurance, and joint-stock companies, and bankers, to whom monies are due from persons in Scotland, and all persons holding shares in Scotch joint-stock companies, are easily brought within the jurisdiction of the Scotch Courts. Thus an American, having given a power of attorney to his English agent at

[a] *Muir* v. *Collett*, 23 B. D. M. 1229, and cases cited.

[b] *Thomson* v. *Whitehead*, 34 Sc. Jur. 163.

[c] *London and North-Western Railway Company* v. *Lindsay*, 30 Sc. Jur. 336, 32 Sc. Jur. 221; *Dickson* v. *Wilkin*, 31 Sc. Jur. 595.

[d] *London and North-Western Railway Company* v. *Lindsay*, 22 D. B. M. 585.

Liverpool, who arrests the goods of another American in Scotland, is able to sue that other American in Scotland.[a] There is no corresponding mode in England of drawing foreigners within the jurisdiction of its courts, except in the city of London proper, Bristol, Exeter, and Lancaster, where the ancient custom of foreign attachment still prevails in derogation of the common law.

1248. *Jurisdiction of Court of Chancery over foreigners, etc.*—The Court of Chancery has jurisdiction over any person who is personally within its jurisdiction, and who is personally served with the bill or summons; and it will arrest an absconding defendant under a writ of *ne exeat regno*. But, like the courts of common law, it has no inherent jurisdiction over persons, whether natives or foreigners, while resident abroad, and its process has no efficacy out of England. An exception, however, has been created to this rule by statutes which enable a defendant, resident abroad or in Scotland, to be duly cited by personal service there, in certain cases, viz., where the subject-matter of the suit is land in England, or incumbrances thereon, or Government stock, or shares of public companies in England.[b] The control of the Court over persons resident abroad is thus limited.

The Court may restrain a creditor from suing in Scotland, but will not do so merely because a decree in an administration suit in England has been made, under which decree he may come in.[c] The Scotch Court has a similar power to interdict persons from suing in England in certain cases.[d] As a general rule, when the Courts of Session and of Chancery have each jurisdiction, the Court which is seised of the subject-matter of the suit ought to be allowed to proceed, and the other Court should act as auxiliary to the jurisdiction of the other.[e]

1249. *Action on English contracts in Scotland.*—Where a contract is made in England, and is invalid there, on the ground of want of

[a] *Knight* v. *Freeto*, 2 Macph. 386; *Gray* v *Polhill*, 9 D. B. M. 1146; *Sinclair* v. *Staples*, 22 D. B. M. 600; *Anderson* v. *Wood*, Hume 258.

[b] 2 & 3 W. IV. c. 33; 4 & 5 W. IV. c. 82; 15 & 16 Vic. c. 86, § 63; Consol. Ord. x. § 7; *Cookney* v. *Anderson*, 1 De G. J. & S. 365; *Foley* v. *Maillardet*, 1 De G. J. & S. 389; *Steele* v. *Stuart*, 1 H. & M. 793.

[c] *Carron Company* v. *Maclaren*, 5 H. L. C. 416; *Venning* v. *Lloyd*, 1 De G. F. & J. 193.

[d] *Carron Company* v. *Stainton*, 29 Sc. Jur. 150; *Dawson's Trustees* v. *Maclean*, 22 D. B. M. 685; *M'Cubbin* v. *Venning*, 31 Sc. Jur. 322; 32 Sc. Jur. 68.

[e] *Venning* v. *Lloyd*, 1 De G. F. & J. 193; *Moore* v. *Stuart*, 7 H. L. C. 440.

stamp or illegality, it is generally treated as invalid also in Scotland.[a] The illegality of a foreign contract is also treated in England as regulated by the *lex loci contractus.*[b] Though a contract executed in Scotland in the English form would not *per se* be binding, yet it may become so by the parties acting upon it, *i.e., rei interventu.*[c] Where the *lex loci contractus* allows a contract to be proved only by one kind of evidence, it is not clearly settled when and how far such evidence will be considered part of the substance or solemnity, or whether the *lex fori* will insist on its own evidence of the contract. Thus a compliance with the statute of frauds is treated in England as part of the remedy, and if a foreign contract do not comply with the statute, the Court will not enforce it.[d] The rule in Scotland tends the other way.[e]

1250.—*Lien on goods sold in either country.*—Where parties in England sell goods in Scotland, the party in possession of the goods there may set up a lien on the goods, according to the law of Scotland, for the right of lien is part of the *lex fori.*[f] A similar rule would be acted on in England.[g]

1251.—*Bill of exchange.*—Where parties in different countries contract by a single instrument, as a bill of exchange, the form required is that of the country where the bill begins to operate.[h] A foreigner may sue out execution summarily on a bill in Scotland, and requires to sist no mandatory unless the charge is suspended and ulterior proceedings follow.[i]

1252.—*Consideration of contract.*—The validity of the consideration of a contract depends, in England, on the *lex loci contractus.*[k] In Scotland the *lex fori* regulates the proof of the consideration, if a consideration be required.[l] And a contract made elsewhere,[m]

[a] *Taylor* v. *Scott*, 9 D. B. M. 1504; *Sinclair* v. *Alexander*, 14 D. B. M. 217; Story, Confl. § 630.

[b] *Bramley* v. *South-Eastern Railway Company*, 12 C. B. N. S. 63; *Bristowe* v. *Sequeville*, 5 Exch. 279. As to a tort, see *Scott* v. *Seymour*, 1 H. & C. 219.

[c] *United Company* v. *Murray*, 22 D. B M. 1185; *Church Company* v. *Wink*, 19 D. B. M. 1079.

[d] *Bristowe* v. *Sequeville*, 5 Exch. 275; *Leroux* v. *Brown*, 12 C. B. 801.

[e] *Purvis* v. *Purvis*, 23 D. B. M. 812; *E. Hopetoun* v. *Scots Mining Company*, 18 D. B. M. 739.

[f] *Macnaughton* v. *Baird*, 14 B. D. M. 1010.

[g] *Macfarlane* v. *Norris*, 2 B. & S. 783.

[h] *Snaith* v. *Mingay*, 1 M. & S. 87; *Abraham* v. *Skinner*, 12 A. & E. 763; *Acebal* v. *Levy*, 10 Bing. 376. So in Scotland *Strathern* v. *Masterman*, 12 D. B. M. 1087; *Robertson* v. *Burdekin*, 6 D. B. M. 17.

[i] *Ross* v. *Shaw*, 11 D. B. M. 984.

[k] *Wynne* v. *Callander*, 1 Russ. 293; *Quarries* v. *Colson*, 1 Phil. 147.

[l] *Mackenzie* v. *Hall*, 27 Sc. Jur. 55.

[m] *Smith* v. *Brown*, Salk. 666; *Brook* v. *Brook*, 9 H C. L. 193.

if considered in England contrary to good morals, will not be enforced by an English court.[a]

1253. *Limitation of actions.*—In actions on contracts, prescription or the limitation of actions is part of the *lex fori* where the action is brought. Hence, if an action is brought for breach of an English contract in Scotland, the Scotch term of prescription will regulate the proper period for bringing it.[b] Thus, if the action for a debt on simple contract is brought in England, it is always a good defence that it is six years old; while, if the action is brought in Scotland, it requires the lapse of forty years to be a complete defence, though three years, or five, or six, or seven years, respectively, will also be a good defence, according to the nature of the demand, if there is no writing of the defender acknowledging the debt, or if he deny it on his oath. So if an English attorney sue his client in Scotland for his bill of costs, the action will be subject to the triennial prescription.[c]

1254. *Assignment of Scotch debt in England.*—The assignment of a debt is good, according to the law of the place where it is executed. Thus, if a debt due by a Scotchman is assigned in England, the assignment, for the sake of competing with arrestments in Scotland, should be followed by immediate notice or intimation to the debtor.[d]

1255. *Bankruptcy in either country.*—On the bankruptcy of a person in either country, the adjudication of bankruptcy, or award of sequestration, passes all the real and personal property of the bankrupt locally situate in the other country.[e]

1257. *Law of evidence applicable to debts.*—The *lex fori* regulates the mode of proof of the debt, each court adhering to its own rules of evidence. Hence, if an Englishman lend a Scotchman £100 in presence of two witnesses, but take no writing for it, if the action is brought in England, the two witnesses may prove the debt; whereas

[a] *Hope* v. *Hope*, 22 Beav. 351.

[b] *Don* v. *Lippman*, 5 Cl. & F. 1; *Fergusson* v. *Fyffe*, 8 Cl. & F. 140.

[c] *Campbell* v. *Stein*, 6 Dow, 116.

[d] *Donaldson* v. *Ord*, 27 Sc. Jur. 625; *Wallace* v. *Davies*, 25 Sc. Jur. 415; and see *ante*, § 478.

[e] 12 & 13 Vic. c. 106, § 142; 19 & 20 Vic. c. 79, § 102. See also *Royal Bank* v. *Cuthbert*, 1 Rose, 462; *Selkrig* v. *Davis*, 2 Rose, 291; 1 Dow, 230; *Solomons* v. *Ross*, 1 H. Bl. 131; *Alison* v. *Furnival*, 1 C. M. R. 277; *Mein* v. *Taylor*, 27 Sc. Jur. 185; *Rattray* v. *White*, 4 D. B. M. 880. See *ante*, § 1176.

if the action is brought in Scotland, the two witnesses will not be admitted and the only chance of recovering the debt is for the Englishman to stake the truth on the oath of the Scotchman, called a reference to his oath.[a]

1258. Hence also, if the debt turns on a deed, if the action is brought in England, it will be necessary at the trial not only to produce the deed, but to call a witness who saw the deed executed; whereas if the action is brought in Scotland, no such witness need be called, it being enough to produce the deed, which, if regular, proves itself. Thus it is often a great advantage to have a deed executed in England both in the English and Scotch form, so as, in the event of its being sued on in Scotland, to save the expense of sending a witness to prove the execution. Sometimes, however, a Scotch court has admitted an English deed as *prima facie* evidence, without the witness being called.[b]

1259. On the other hand, if a Scotch deed is given in evidence in an English court, a witness must be called to prove it by swearing that he witnessed its execution.

1262. *Bond debt.*—If an English bond is given in England for a debt, it will be a good ground of action anywhere, but if sued on in England or Scotland, not only must an action be brought, but a witness be called to prove its execution. Whereas if a Scotch bond be taken in Scotland for the debt, with the usual clause of registration, no action requires to be brought upon it in Scotland at all, but execution issues at once, without action. The plaintiff, while suing the debtor in England, will be allowed to sue him also in Scotland.[c] If, however, an English bond be entered into in Scotland by the debtor, it is not a probative writ in Scotland; and where a surety executed there, in the English form, a bond to an English insurance company, it was held they could not sue such surety in Scotland, for the bond was no evidence of the contract.[d]

1264. *Scotsman suing Englishman, and vice versa.*—If a Scotch creditor sues his English debtor he cannot attach the debtor's personal or real property until he gets judgment in the action, which the de-

[a] See *ante*, § 449.
[b] *Scott* v. *Miller*, 5 Murr. 239.
[c] *Cochrane* v. *Paul*, 30 Sc. Jur. 61.
[d] *Church of England Ass. Co.* v. *Hodges*, 29 Sc. Jur. 196; see also *ibid*, 489, where the surety, in the circumstances, was held barred by *rei interventus* from setting up that defence.

fendant may protract, by astute pleadings, until a remote period, and meanwhile dispose of all such property; whereas if an Englishman sue a Scotsman in Scotland, he can, in general, attach or arrest all the goods and debts of the defendant in the hands of third parties at the outset of the action, and he may also use inhibition against the defendant's heritable property, and thereby acquire security until the time when a decree can be obtained. Moreover, if an Englishman hold real property in Scotland, he may be sued in the courts there in matters of debt and contract, wherever the cause of action arose.[a] So his creditor, while suing him in England, may also resort to Scotland and raise an action there for the mere purpose of acquiring an immediate hold on the real estate there.[b]

REAL PROPERTY.

1266. *Real property governed by lex loci.*—In general, the rights affecting land savour as it were of the soil, and must follow the law of the country within whose jurisdiction the land is situated.

1268. Thus land can only be conveyed according to the law of the place where it is situated.[c] Hence an English deed of conveyance or an English will, though competent to pass real estate in England, has no operation on real estate in Scotland, unless the deed is executed according to the law of Scotland. But it is competent to execute a Scotch disposition of the Scotch estate, and to declare that the property shall go to a person or persons to be named by an English will,[d] or a Scotch disposition of the estate may reserve power to revoke, and such power may be executed by the English will.[e]

1269. *Equitable mortgage in England of Scotch estate.*—It has been held in England that where the title-deeds of a Scotch estate have been deposited with a London banker in such a way, that, if the lands had been in England, the deposit would have amounted to an equitable mortgage, the owner, being in England and subject to the

[a] *Ferrie* v. *Woodward*, 9 S. D. 854.
[b] *Hawkins* v. *Wedderburn*, 4 D. B. M. 924; *Fordyce* v. *Brydges*, 4 D. B. M. 1336.
[c] Story, Conflict, § 363; 2 Burge, 840.
[d] *Norton* v. *Menzies*, 13 D. B. M. 1017; *Cameron* v. *Mackie*, 7 W. S. 106.
[e] *Leith's Trustees* v. *Leith*, 10 D. B. M. 1037.

jurisdiction of the Court of Chancery, will be bound to give effect to this mortgage, though the courts in Scotland hold such deposit of titles neither a mortgage nor an agreement for a mortgage.[a]

1270. But an agreement in England, valid by the law of England, to sell land in Scotland will be ordered by the Court of Chancery to be specifically performed,[b] and will also be enforced by the courts in Scotland.[c]

1272. Incorporeal rights affecting land are subject to the same rules as the real estate. Thus an English will does not pass a Scotch bond and disposition in security,[d] and if the testator was domiciled in England, the Scotch heir-at-law could not claim to have the debt reimbursed out of the personal estate.[e]

1275. *An English and Scotch security for same debt.*—Where there is a personal security, as an English bond granted for a debt, and there is afterwards a Scotch real security given for the same debt, as for example, a Scotch bond and disposition in security, the debt due by the English bond is not merged in the Scotch bond as the *jus nobilius*, and the English bond may pass by the testator's will, though the will did not pass the Scotch bond, and the debt will accordingly be payable to the person indicated by the English will, though thereby disappointing the Scotch heir-at-law.[f]

1278. *Bequest for charity.*—Though land in England cannot be devised for the establishment of a charity in Scotland, by reason of the Mortmain Act,[g] yet money may be bequeathed by an English will for the purchase of lands in Scotland to be devoted to charitable purposes.[h] The Mortmain Act prevails only in England, and neither reaches Scotland nor the colonies.[i]

1279. *English will of Scotch land.*—Though land can only pass by a deed executed according to the laws of the country where the

[a] Exp. Pollard, Mont. & Ch. 239; see also *Martin* v. *Martin*, 2 Russ. & Myl. 507.

[b] *Archer* v. *Preston*, 1 Vern. 77; *Jackson* v. *Petrie*, 10 Ves. 165.

[c] M. 4462, 4476; *Weir* v. *Laing*, 1 S. D. 207; 1 Ross, L. C. 10; See Story's Conflict, § 436; *Brack* v. *Johnston*, 5 W. S. 61.

[d] *Johnstone* v. *Bempde*, 4 Med. 274; *Jerningham* v. *Herbert*, 4 Russ. 388.

[e] *E. Winchelsea* v. *Garetty*, 2 Keen, 293; *Elliott* v. *Minto*, 6 Mad. 16; *Brodie* v. *Barry*, 2 V. & B. 132.

[f] *Cust* v. *Goring*, 18 Beav. 383; *Buccleugh* v. *Home*, 4 Madd. 467; *Brodie* v. *Barry*, 2 V. & B. 36, 127; *Johnstone* v. *Baker*, 4 Mad. 474; *Jerningham* v. *Herbert*, 4 Russ. 388; *Allen* v. *Anderson*, 5 Hare, 163; *Drummond* v. *Drummond*, 1 Jac. & W. 470.

[g] *Curtis* v. *Hutton*, 14 Ves. 537.

[h] *Att.-Gen.* v. *Mills*, 3 Russ. 328; 2 Dow & Cl. 393.

[i] *Whicker* v. *Hume*, 6 H. L. Cas.

land is situated, yet a will may put the heir-at-law to an election, so that he must either give effect to the informal conveyance or renounce all benefit under the will. Hence a Scotch heir must elect under an English will purporting to convey Scotch real estate.[a]

SUCCESSION.

1282. *Succession to real estate ab intestato.*—The law of the country where the land is situated declares the rule of inheritance as to that land, and points out the person entitled to succeed. And the *lex loci rei sitæ* will determine the *status* of the party claiming to succeed by its own rules. Thus if a person is born of an alleged incestuous marriage in England, the courts in Scotland will determine his status by their own rules as to incest, and will not adopt the law of England.[b]

1284. *Scotch heir succeeding to English land.*—Thus no person who was not born in lawful wedlock can succeed to land in England, and hence a person who was born illegitimate in Scotland, but who afterwards was legitimated there, by the subsequent marriage of his parents, and who might well be the heir-at-law to land in Scotland, is, nevertheless, incapable of succeeding to the English land.[c] Moreover, if a person born illegitimate, but afterwards legitimated by the law of Scotland, dies in England, leaving land, he is treated as a bastard, and can have no heirs.[d]

1286. Hence, also, if a person die intestate, leaving real estate in England which he had purchased, and an elder and younger brother and a father, the father takes the estate first, then the elder brother, then the younger brother. While if the estate was in Scotland, his elder brother would take first, then the younger, then the father.[e]

1289. *Domicile.*—At birth every child has a certain domicile impressed upon it, and its domicile of origin continues throughout

[a] *Brodie* v. *Barry*, 2 V. & B. 127; *Allen* v. *Anderson*, 5 Hare, 163; *Johnson* v. *Telford*, 1 Russ. & My. 244; and in Scotland, *Dundas* v. *Dundas*, 2 Dow & Cl. 349; 4 W. S. 460; *Trotter* v. *Trotter*, 3 W. S. 407. See *ante*, § 1268.

[b] *Fenton* v. *Livingstone*, 31 Sc. Jur. 578.

[c] *Birtwhistle* v. *Vandill*, 5 B. & C. 438; 2 Cl. & F. 571; *Re* Don's Estate, 4 Drewr. 194; *Fenton* v. *Livingstone*, 31 Sc. Jur. 578.

[d] *Re* Don's Estate, 4 Drewr. 194.

[e] See *ante*, § 758, 760.

life, until some other has been acquired.[a] The domicile of the child is, in general, that which the father had at the time of the birth, or which the mother had, if unmarried; and varies with that of the father or mother respectively, until majority or marriage. *Prima facie*, the place of residence is the domicile,[b] provided there is an *animus manendi*.[c] The wife's domicile is that of the husband,[d] and it seems continues so for most purposes, even after a decree of judicial separation.[e] Where a person holds an office which requires residence, then the domicile is that of such residence. Thus a person in the military service of India acquires an Anglo-Indian domicile.[f] But where the residence is occasional, as that of a Scotchman attending Parliament in London, the domicile is not changed.[g] If the residence is partly at two places, one a place of business and the other a place where the wife and family reside, the domicile is at the latter place.[h]

1294. *Succession to personal estate by will.*—When a person dies, his will is valid, according to the law of his domicile at his death. If confirmation be granted in Scotland, and the personal estate, wherever situated, is set forth in the inventory, such confirmation vests such personalty situated in England or Ireland, and the seal of the Probate Court in England may be affixed to such confirmation.[i] And conversely, probate granted in England may be indorsed by the commissary in Scotland, with the like effect.[j]

1296. But a Scotch executor must still pay the debts according to the rules of Scotch and not of English law, and so conversely will an English executor, seeing that each is accountable only in his own court.[k]

1298. But the Court of Chancery may adopt the proceedings of

[a] Story's Conflict, § 46; *Bremer* v. *Freeman*, 12 Moore, P. C.; *Whicker* v. *Hume*, 6 H. L. Cas.; *Lord* v. *Colvin*, 4 Drewr. 366.

[b] *Bruce* v. *Bruce*, 2 B & P. 228; *Bempde* v. *Johnson*, 3 Ves. 198; *Stanley* v. *Bernes*, 3 Hagg. 374; *De Bonneval* v. *De Bonneval*, 1 Curt. 864.

[c] *Ibid*; *Munro* v. *Munro*, 7 Cl. & F. 842; *Hodgson* v. *De Beauchesne*, 12 Moore, P. C.; *Whicker* v. *Hume*, 6 H. L. Cas.; *Donaldson* v. *M'Clure*, 30 Sc. Jur. 165.

[d] *Bremer* v. *Freeman*, 12 Moore, P. C.

[e] *Dolphin* v. *Robins*, 7 H. L. Cas.

[f] *Forbes* v. *Forbes*, Kay, 359; *Dalhousie* v. *Ommaney*, 7 Cl. & F. 817.

[g] *Somerville* v. *Somerville*, 5 Ves. 750; Phillimore on Dom. 82.

[h] *Ibid*; *Forbes* v. *Forbes*, Kay, 341.

[i] 21 & 22 Vic. c. 56, § 9, 12, 13.

[j] *Ibid*, § 14; Re *Muir*, 33 L. T. Rep. 61 See the statute in Appendix.

[k] Story's Conflict, § 524.

the Scotch executor where the bulk of the property is in Scotland.[a] And the Scotch executor may be sued in England for so much of the property as is there situated and received.[b]

1299. *Wills of British subjects.*—Though the English rule was, that a will of personal estate, if not conformable to the *lex domicilii*, was invalid,[c] while the Scotch rule admitted a will, though not conformable to the law of the domicile, if conformable to the *lex loci actus*,[d] the law is now made uniform as to persons dying after 6th August 1861. The will of any British subject as regards personal estate, made out of the United Kingdom, is valid, wherever the domicile may be, if the will is conformable to the *lex loci actus*,[e] or the *lex domicilii originis*; and a will made in the United Kingdom will be valid if conformable to the *lex loci actus*. Mere change of domicile does not now revoke or alter the construction of such will.[f] As regards real estate, the will must be conformable to the *lex rei sitæ*.

1300. *Foreign domicile of British subjects.*—Owing to the hardships of the law of domicile, it is now enacted that, if a convention be entered into between Her Majesty and a foreign state, no British subject resident in a foreign country, at his or her death, shall be deemed domiciled there unless he has resided there for one year preceding the death, and also deposited in a public office there his declaration of a change of domicile.[g]

1302. *Law of domicile decides legitimacy.*—The law of the domicile decides the legitimacy of the next of kin and of legatees.[h] Hence, if the deceased die domiciled in England, any child who has been legitimated in Scotland, by the subsequent marriage of his parents, will be rejected in England; while if the deceased die domiciled in Scotland, he will be admitted by the court in Scotland as one of the next of kin.

1304. Moreover, the law of the domicile determines what portion of the estate the burdens fall upon primarily, and what relief one representative has as against the other. But where the law of Scot-

[a] *Meiklam* v. *Campbell*, 24 Beav. 100; see *Simpson* v. *Doud*, 27 Sc. Jur. 135.

[b] *Innes* v. *Mitchell*, 4 Drewr. 57, 141; 1 De G. & J. 423.

[c] *Bremer* v. *Freeman*, 10 Moore P. C. 306.

[d] *Purvis* v. *Purvis*, 23 D. B. M. 812.

[e] 24 & 25 Vic. c. 114, §§ 1, 2.

[f] 24 & 25 Vic. c. 114, § 4. As to questions of revocation of Scotch dispositions by English wills, see *Boe* v. *Anderson*, 24 D. B. M. 732; *Campbell* v. *Campbell*, 24 D. B. M. 1321; *Leny* v. *Leny*, 32 Sc. Jur. 587; *Leith* v. *Leith*, 10 D. B. M. 406; 1 Ross L. C. 404; *Fordyce* v. *Cockburn*, 5 S. D. 897.

[g] 24 & 25 Vic. c. 121.

[h] Story's Conflict, 481; Re *Wright*, 2 K. & J. 615; *Boyes* v. *Bedale*, 1 H. & M. 798.

land treats as heritable what is personalty in the law of England, then the *lex domicilii* must yield to the *lex rei sitæ*. Hence, if a Scotch heir-at-law pay such debts in Scotland, he may have no exoneration against the personal estate in England, though in England such debts be personalty.[a]

1306. *The law of domicile interprets the will.*—The law of the domicile at the death of the testator interprets his will, and the court in which the question arises will to a certain extent adopt the rules of the law of the domicile.[b] Thus the court in Scotland will decide whether the English will excludes the child's right to legitim,[c] and whether the words he has used are sufficient to carry a legacy to the legatee's representatives.[d]

1308. *Succession to personal estate ab intestato.*—Where a person dies intestate, leaving personal property, the law of his domicile points out the next of kin who are entitled to succeed.

1309. Hence, if a person die domiciled in England, leaving only a brother and a father, the father will take the whole and the brother nothing; whereas, if he died domiciled in Scotland, the father would take half and the brother half.

1310. Again, if the deceased was domiciled in England, leaving only a mother and a brother, and a nephew by a deceased brother or sister, each of these three would take an equal share—a third; if the person was domiciled in Scotland, the mother, since 1856, will also take a third, and the other two each one-third.

1311. Again, if the deceased was domiciled in England, and left only a full brother and a half-brother, each would take a half; if he was domiciled in Scotland, the full brother would take the whole.

1312. *Administration of estate.*—But though the next of kin will be pointed out by the *lex domicilii*, yet the order of priority of debts is regulated by the *lex fori* where the estate is administered.[e]

[a] *Hall* v. *Hall*, 16 D. B. M. 1057; *Elliott* v. *Minto*, 6 Mad. 16; *Drummond* v. *Drummond*, 2 V. & B. 132.

[b] *Di Sora* v. *Phillips*, 10 H. L. C. 624; *Trotter* v. *Trotter*, 3 W. S. 407, 4 Bligh N. S. 502; *Yates* v. *Thomson*, 3 Cl. & F. 544; *Sinclair* v. *Alexander*, 24 Sc. Jur. 101.

[c] *Hog* v. *Lashley*, 3 Hagg. 415 *n*, 4 Pat. Ap. 581; *Price* v. *Dewhurst*, 8 Sim. 279, 4 My. & Cr. 76; *Ommaney* v. *Bingham*, 3 Pat. Ap. 448; *Keith's Trustees* v. *Keith*, 29 Sc. Jur. 497; *Campbell* v. *Campbell*, 24 D. B. M. 1321.

[d] *Anstruther* v. *Chalmer*, 2 Sim. 1; *Brown* v. *Brown*, 4 W. S. 28; *Ferguson* v. *Marjoribanks*, 25 Sc. Jur. 376; *Boe* v. *Anderson*, 24 D. B. M. 732.

[e] *Drummond* v. *Drummond*, 6 Brown, P. C. 602; *Winchelsea* v. *Garetty*, 2 Keen, 293; *Bank of Scotland* v. *Hall*, 26 Sc. Jur. 570. See *ante*, § 1296.

MARRIAGE.

1316. *Contract of marriage.*—The status of marriage is determined by the *lex loci contractus*, but this rule applies only to the ceremonies required for the constitution of the contract, and not to the essentials of the contract, which depend on the domicile of the husband at the time of marriage.[a] It is part of the essentials of the contract, whether the marriage was incestuous or contrary to some fundamental moral or religious rule of the *lex domicilii.* In questions of succession to real estate, the rules of religion and morality of the *lex rei sitæ* are to be applied, at least in Scotland, as over-ruling those of the *lex domicilii.*[b] If the parties domiciled in country A go to another country B, for the sole purpose of availing themselves of the forms of marriage in B, the marriage will be good everywhere if conformable to the forms of B; but not if the contract was contrary to the morality or religion of A.[c]

1318. But, since 1856, as between Scotland and other countries, an irregular marriage contracted in Scotland, by acknowledgment, declaration, or ceremony, will now be void, unless one of the parties had for twenty-one days next previously resided in Scotland, or had usually resided there.[d] Formerly, if English parties went for five minutes into Scotland, and exchanged matrimonial consent there, the marriage was good everywhere, for the English Marriage Act is territorial in its operation.[e]

1320. *Jurisdiction in divorce.*—If the remedies for breach of the marriage-contract be viewed as similar to those for other contracts as to personalty, then the courts of England and Scotland approach the subject of jurisdiction from opposite quarters. In England, the domicile of the plaintiff is immaterial. As to the defendant, if he is personally present in England when served with the writ of summons or bill, it is quite immaterial where his domicile then is, or where he was born, where the contract was made or broken, or where the wrong was done, and therefore equally immaterial, except as regards construction, what the law of other countries on the subject may be—

[a] *Brook* v. *Brook*, 9 H. L. C. 193; *Warrender* v. *Warrender*, 2 Cl. & F. 529; *Fenton* v. *Livingstone*, 3 Macq. Ap. 497.

[b] *Fenton* v. *Livingstone*, 3 Macq. Ap. 497.

[c] *Brook* v. *Brook*, 9 H. L. C. 193.

[d] 19 & 20 Vic. c. 96.

[e] *Compton* v. *Bearcroft*, 2 Hagg. 443; *Ilderton* v. *Ilderton*, 2 H. B. C. 145; *Brook* v. *Brook*, 9 H. L. Cas. 193; *Simonin* v. *Mallac*, 29 L. J. 97 Prob.

personal service of the writ in England being everything in the question of jurisdiction. But in Scotland personal service *per se* is nothing; it is only when other things concur that it is one of the elements which must concur to give jurisdiction; there are other things to be considered, such as whether the defender was a Scotchman born, where the contract was made, or the wrong was done. A residence of the defendant for forty days in Scotland will be in all cases sufficient, *per se*, to give jurisdiction; but if not resident at all, or for less than forty days, he must have real or personal property in Scotland, the latter being first attached *jurisdictionis fundandæ causa*, or he must be arrested *in meditatione fugæ*.[a]

1321. *English jurisdiction in divorce.*—In England the subject of jurisdiction in the matter of divorce is entirely new, and no general principles have yet been arrived at. But marriage being a contract which affects the status of the married parties, the English Divorce Court looks at the domicile of the parties, which in general is the same thing as the domicile of the husband; and the domicile meant is the domicile which would regulate the question of succession to personal estate. The party petitioning must at least be *bona fide* resident in England. A wife resident in England, though the husband had gone abroad and acquired a domicile there, has been allowed to petition;[b] but not if the husband never was domiciled in England.[c] If the parties are both English subjects, and in England, then the English Court has jurisdiction, though the marriage and adultery took place abroad.[d] Further than this elementary stage the subject is entirely undeveloped.[e]

The English Courts refused, before the Divorce Act, 20 and 21 Vic. c. 85, to recognise a divorce obtained in Scotland by parties married in England who had gone to Scotland for the sole purpose of obtaining a divorce.[f] But if the parties were at the time domiciled in Scotland, such a divorce would now be admitted in England, unless the grounds of divorce were repugnant to English notions of religion or morality.

1322. *Scotch jurisdiction in divorce.*—In Scotland, several recent

[a] See *ante*, § 1244.
[b] *Deck* v. *Deck*, 2 Sw. & T. 90.
[c] *Yelverton* v. *Yelverton*, 1 Sw. & T. 576.
[d] *Ratcliffe* v. *Ratcliffe*, 29 L. J. 172 Prob.
[e] See *Deck* v. *Deck*, 2 Sw. & T. 90; *Bond* v. *Bond*, 2 Sw. & T. 93; *Brodie* v. *Brodie*, 2 Sw. & T. 259.
[f] *Dolphin* v. *Robins*, 7 H. L. C. 390; *Lolley's case*, Russ. & Ry. 237; *Pitt* v. *Pitt*, 36 Sc. Jur. 522; *Conway* v. *Beasley*, 3 Hagg. 639.

cases had settled the rule as to jurisdiction in cases of divorce to be this:—The first question was, not what was the nativity of the parties, or the place of marriage, or the *locus delicti*, but where was the home or matrimonial domicile of the pair at the time of the suit? This was held to be not the same question as is raised in ascertaining the domicile for purposes of succession; for a *bona fide* residence for forty days, without any immediate intention of changing (provided, however, the sole purpose of the residence was not merely that of raising the divorce suit), would give jurisdiction though the domicile for purposes of succession was not in Scotland. The matrimonial domicile was ascertained, not by blindly assuming the wife's domicile to be that of the husband, and that of the marriage to be that of the husband, but by considering the relative conduct of the parties. Hence, if the husband was *bona fide* residing in Scotland at the time, and it was the duty of his wife to join him there, the Scotch Court would assume jurisdiction, though the wife had never been in Scotland in her life; and so, if the wife and the matrimonial domicile were in Scotland, even though the husband, when commencing the action, had been five years out of Scotland, and had acquired a domicile elsewhere.[a]

The above doctrine, however, that the matrimonial domicile may be something short of the domicile which exists for purposes of succession has been over-ruled by the House of Lords.[b] And it would now seem that the only safe ground of jurisdiction in Scotland is that of the absolute domicile of the husband.[c]

1323. It is now necessary in such actions, when the defender is out of Scotland, to serve him or her personally with the summons, unless the residence cannot be discovered.[d]

1324. If the husband, domiciled in Scotland, goes abroad, leaving his wife in Scotland, she may sue for a divorce in Scotland if he is served personally.[e] It seems, however, the desertion must be for the purpose of the adultery.[f] And if the husband be a foreigner, or even a Scotchman who has become domiciled abroad, though married in Scot-

[a] *Pitt* v. *Pitt*, 36 Sc. Jur. 522; *Jack* v. *Jack*, 34 Sc. Jur. 234; *Warrender* v. *Warrender*, Cl. & F.; *French* v. *Pilcher*, 12 F. C. 420; *Tovey* v. *Lindsay*, 1 Dow 131; *Ringer* v. *Churchhill*, 2 D. B. M. 307.

[b] *Pitt* v. *Pitt*, 36 Sc. Jur. 522.

[c] *Ibid.*

[d] 24 & 25 Vic. c. 86, § 10.

[e] *Scott* v. *Scott*, 21 D. B. M. 285; *Buchanan* v. *Downie*, 16 S. D. 82; 24 & 25 Vic. c. 86, § 10.

[f] Per L. Moncreiff, A B v. C D, 7 D. B. M. 556.

land, the court in Scotland has no jurisdiction to grant divorce for desertion.[a] And if the husband is domiciled abroad, the fact of the wife residing in Scotland seems to give no jurisdiction against him.[b] In such cases, the jurisdiction of the court depends on what is the home or domicile of the married parties, and if it is Scotch, though the husband is abroad, if the wife is in Scotland, the Scotch court may exercise jurisdiction.[c]

If the husband had been domiciled in Scotland at the time of the marriage, and the wife be in Scotland and commit adultery there, the Scotch court will grant him divorce though he is domiciled abroad.[d]

LEGITIMACY.

1325. The legitimacy of a person depends in general upon whether at the time of his birth the parents were validly married in the country where the child was born; as, according to the law of Scotland, a child, born a bastard, may be legitimated, to all intents and purposes, by the subsequent marriage of his parents in Scotland. The following are the results of the conflicting rules as between England and Scotland:—According to the law of Scotland, if the child is born a bastard anywhere, and the parents afterwards marry in Scotland, or even elsewhere, provided the father is then domiciled in Scotland, the child is deemed legitimate in Scotland; whereas, if the parents were not domiciled in Scotland at the time of the marriage, but in England, the child will be deemed in Scotland for ever illegitimate.[e]

According to the law of England, even in cases of succession to personal estate, if the testator was domiciled in England, the court will not acknowledge a child of an Englishman born a bastard, though legitimated *per subsequens matrimonium* in its own country.[f] And if a child be born a bastard in England, that bastardy will be treated by the English Courts as indelible, whatever domicile the father and mother may afterwards resort to for the purpose of marrying and settling.[g]

[a] A B v. C D, 7 D. B. M. 556.
[b] *Pitt* v. *Pitt*, 36 Sc. Jur. 522.
[c] *Hume* v. *Hume*, 24 D. B. M. 1342.
[d] *Shields* v. *Beattie*, 15 D. B. M. 142. But see *Pitt* v. *Pitt*, 32 Sc. Jur. 522.
[e] *Monro* v. *Monro*, 1 Rob. Ap. 492, 7 Cl. & F. 817; *Macdowall* v. *Macdowall*, 14 D. B. M. 525; *Aikman* v. *Aikman*, 3 Macq. Ap. 854.
[f] *Boyes* v. *Bedale*, 1 H. & M. 799; but see, *contra*, *Goodman* v. *Goodman*, 3 Giff. 643.
[g] Re *Wright's Trustees*, 2 K. & J. 595; *Boyes* v. *Bedale*, 1 H. & M. 799.

Judgments.

In Scotland the same rule governs the questions of succession to real estate; but, in considering the invalidity of a foreign marriage on the ground of incest, the courts must apply their own law in preference to that of the *lex loci contractus* or the *lex domicilii*.[a] In England a person, if born a bastard in any country, and though afterwards legitimated in such country, is incapable of succeeding to real estate in England,[b] and is treated as a bastard in England.[c]

JUDGMENTS.

1326. *Foreign Judgments.*—Where a foreign judgment is *in rem*, like a decree of a prize court, or of the Court of Exchequer as to forfeiture, and not *in personam*, like a judgment in an ordinary action for damages or debt, it is binding everywhere, and the courts in England give effect to it. The difficulty generally is to determine whether the judgment is *in rem* or *in personam*, for some proceedings commence *in personam* and end *in rem*.[d] So some proceedings commence *in rem* and end *in personam*, like arrestment *jurisdictionis fundandæ causa* in Scotland.[e] A judgment *in rem* is sometimes said figuratively to impress a status on the thing, just as the status of marriage or lunacy is impressed on individuals.

1327. As to foreign judgments *in personam*, the court will merely look at the circumstances under which the action or suit was brought, and if the foreign court had jurisdiction, and the judgment seems regular on its face, then such judgment will be accepted as conclusive to this extent, that the foreign court properly applied its own law, and properly decided questions of fact. The foreign judgment is therefore to the one party a good plea in law,[f] and to the other is a good ground of action, if it is a final and not interlocutory judgment.[g]

The rule in Scotland seems to be the same.[h] A decree in absence, even in Scotland—*i.e.*, when one of the parties has never been cited, or

[a] *Fenton* v. *Livingstone*, 3 Macq. 497.
[b] *Birtwhistle* v. *Wardell*, 2 Cl. & F. 571, 7 Cl. & F. 895.
[c] Re *Don's Estate*, 4 Drewr. 194.
[d] *Cammell* v. *Sewell*, 3 H. & N. 617, 5 H. & N. 728; *Simpson* v. *Fogo*, 1 H. & M. 195; *Castrique* v. *Imrie*, 8 C. B. N. S. 1, 405.
[e] *Harmer* v. *Bell*, 7 Moore, P. C. 267.
[f] *Brissac* v. *Rathbone*, 6 H. & N. 301; *Bank of Australasia* v. *Nias*, 16 Q. B. 717; *Ricardo* v. *Garcias*, 12 Cl. & F. 368; *Scott* v. *Pilkington*, 2 B. & S. 11; *Bank of Australasia* v. *Harding*, 9 C. B. 661; *Ostell* v. *Lepage*, 2 De G. M. & G. 295.
[g] *Patrick* v. *Shedden*, 2 E. & B. 14; *Paul* v. *Roy*, 15 Beav. 433.
[h] *Thompson* v. *Whitehead*, 32 Sc. Jur. 404.

never appeared—may be opened up at any time within forty years; but if an action is brought in England on such decree, the only answer would be to plead the facts, and allege that it was contrary to natural justice, and that defence often fails.[a]

1328. The foreign judgment is *prima facie* evidence of a debt, and hence, if it is to be impeached, the circumstances must be specially pleaded, as for example, that the *ratio decidendi* was some perverse view of the law,[b] or it was decided behind the back of one of the parties,[c] or was grossly unjust,[d] or that the court had no jurisdiction; or that the judgment was obtained by fraud,[e] or is erroneous on the face of it.

It is no answer to an action in England that by the law of the country where the cause of action arose, no damages were recoverable,[f] or that the foreign judgment is under appeal.[g]

1329. When a judgment is obtained in England, the cause of action is extinguished, and merges in that judgment, so that any action brought in Scotland must be brought upon the judgment, and not the original cause of action.[h] But the same rule does not apply to foreign or colonial judgments.

1331. A plea of *lis alibi pendens* in a foreign country is no defence to an action, and is seldom entertained as a ground to suspend the suit; but there may be occasions where a court in one country will suspend judgment until a foreign suit is decided.[i]

1332. *Scotch registered deeds.*—During the progress of a suit it is sometimes necessary to procure a deed registered in Scotland for production in English courts. In such cases, owing to the English court sometimes impounding these documents when produced by the officer of the Scotch court, the latter court, except in peculiar circumstances, refuses to part with the documents where they form part of the records of the court.[k]

[a] *Cowan* v. *Braidwood*, 1 M. & Gr. 882; *Douglas* v. *Forrest*, 4 Bing. 686; *Russell* v. *Smyth*, 8 M. & W. 810.

[b] *Simpson* v. *Fogo*, 1 H. & M. 195; *Castrique* v. *Imrie*, 8 C. B. N. S. 415; *Novelli* v. *Rossi*, 2 B. & P. 757; *Baring* v. *Clugett*, 3 B. & P. 215.

[c] *Buchanan* v. *Rucker*, 1 Camp. 63, 9 East, 192.

[d] *Simpson* v. *Fogo*, 1 H. & M. 195; *Obicini* v. *Blyth*, 8 Bing. 351.

[e] *Shedden* v. *Patrick*, 1 Macq. Ap. 535; *Innes* v *Mitchell*, 4 Drewr. 102.

[f] *Scott* v. *Seymour*, 1 H. & C. 219.

[g] *Scott* v. *Pilkington*, 2 B. & S. 11.

[h] *Maule* v. *Murray*, 7 T. R. 470; *Smith* v. *Nichols*, 5 Bing. N. C. 208.

[i] *Ostell* v. *Le Page*, 2 De G. M. & G. 892; *Venning* v. *Lloyd*, De G. F. & J. 193.

[k] Re *Shedden*, 24 D. B. M. 108; *Jolly*, 2 Macph. 1288.

CAPACITY.

1334. In Scotland a boy of fourteen, and a girl of twelve, becomes *sui juris*, except as to the real estate, and can choose a residence, marry, and make a will of moveables without regard to parents or guardians, or any court. In England the incapacity continues till twenty-one, so that a guardian duly appointed would have a limited power over the person of the ward till that age.

When there is an application to both the courts of England and Scotland to appoint a guardian, the jurisdiction does not depend on domicile or amount of property in either country, but upon what is for the benefit of the infant, and that court which is first seised of the matter is entitled to appoint a guardian, and the other court will adopt and enforce, or otherwise assist, the appointment.[a] And the Scotch court will even appoint a curator, who is resident in England, to a Scotch minor.[b]

1335. But as to other foreign countries, the Court of Chancery will appoint a guardian to a child in England, even though the child has foreign guardians, and is in England temporarily, the existence of foreign guardians being merely an element of consideration for the discretion of the court.[c] If a foreign guardian come into England to reclaim a ward stealthily carried away, the Court of Chancery will recognise the status of such guardian, and assist him.[d] And the Court of Chancery will order a mother residing abroad or in Scotland to deliver up her children to the father, if such father is an English born subject, leaving the foreign or Scotch tribunal to enforce the order if necessary.[e]

1336. So a *curator bonis* or guardian of a Scotch lunatic may sue in England for personal property of the lunatic situated in England, and give a good discharge;[f] and the Scotch court will order him to pay over sums to an English committee.[g]

[a] *Stuart* v. *Moore*, 9 H. L. C. 440.
[b] Lord Macdonald, 36 Sc. Jur. 600.
[c] *Johnstone* v. *Beattie*, 10 Cl. & F. 150.
[d] *Stuart* v. *Moore*, 9 H. L. C. 440, Per L. Campbell; *Dawson* v. *Jay*, 3 De G. M. & G. 764.
[e] *Hope* v. *Hope*, 4 De G. M. & G. 328; *Logan* v. *Fairlie*, Jac. 193.
[f] *Scott* v. *Bentley*, 1 K. & J. 281; *Johnston* v. *Beattie*, 10 Cl. & F. 150; *Stuart* v. *Moore*, 9 H. L. C. 440.
[g] *Laing* v. *Robertson*, 21 D. B. M. 1011; *Allen* v. *Robertson*, 18 D. B. M. 97. As to factor *loco tutoris*, *Lamb* v. *Montgomery*, 20 D. B. M. 1323; *Accountant of Court* v. *Geddes*, 20 D. B. M. 1174.

APPENDIX.

STATUTES.

45 *Geo. III. c.* 92.—An ACT for the more Effectual Execution of the Criminal Laws.—10th July 1805.

Sect. 3. [*Service of subpœna on parties or witnesses in any part of the United Kingdom shall be valid to compel appearance in any other part.*]—And whereas it is fit to provide for the appearance of persons to answer in cases where warrants are not usually issued, and to give evidence in criminal prosecutions in every part of the United Kingdom, be it further enacted, That the service of every writ of subpœna or other process upon any person in any one of the parts of the United Kingdom requiring the appearance of such person to answer or give evidence in any criminal prosecution in any other of the parts of the same, shall be as good and effectual in law as if the same had been served in that part of the United Kingdom where the person so served is required to appear; and in case such person so served shall not appear according to the exigence of such writ or process, it shall be lawful for the Court out of which the same issued, upon proof made of the licence thereof to the satisfaction of the said Court, to transmit a certificate of such default under the seal of the same Court, or under the hand of one of the Judges or Justices of the same, to the Court of King's Bench in England, in case such service was had in England, or in case such service was had in Scotland, to the Court of Justiciary in Scotland, or in case such service was had in Ireland, to the Court of King's Bench in Ireland; and the said last-mentioned Courts respectively shall and may thereupon proceed against and punish the person so having made default in like manner as they might have done if such person had neglected or refused to appear in obedience to a writ of subpœna or other process issued out of such last-mentioned Courts respectively.

Sect. 4. [*Expense of attendance on writs of subpœna shall be tendered to witnesses.*]—Provided always, and be it further enacted, That none of such last-mentioned Courts shall in any case proceed against or punish any person for having made default by not appearing to give evidence in obedience to any writ of subpœna or other process for that purpose, unless it shall be made to appear to such Court that a reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence, and of returning from giving such evidence, had been tendered to such person at the time when such writ of subpœna or other process was served upon such person.

Sect. 6. [*Before warrants, etc., acted upon, proof shall be given of the sealing, etc., thereof.*]—And be it further enacted and declared, That in all

cases in which any warrant or certificate shall, by virtue of either of the said recited Acts, or this Act, be required to be acted upon in any part of the United Kingdom other than that in which the same was originally issued, it shall not be lawful for any Court, or any Judge or Justice, to proceed and enforce or act upon the same until it shall be proved upon oath to such Court, Judge, or Justice, that the seal, signet, and signature upon the same are the seal, signet, and signature respectively of the Court, Judge, or Justice whose seal, signet, and signature the same respectively shall purport to be.

6 *& 7 Vict. c.* 82.—An ACT for extending to Scotland and Ireland the Power of the Lord High Chancellor to grant Commissions to enable Persons to take and receive Affidavits; and for amending the Law relating to Commissions for the Examination of Witnesses.—22d August 1843.

1. [*Lord Chancellor to have the same powers for granting commissions for taking affidavits, etc., in Scotland and Ireland as he now has in England.*]—Whereas it would be convenient to extend to Scotland and Ireland the power of the Lord High Chancellor of Great Britain to grant Commissions in order to enable persons to take affidavits, affirmations, and declarations: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the Lord Chancellor, Lord Keeper or Lords Commissioners of the Great Seal, for the time being, shall have such and the same powers for granting commissions for the purpose of enabling fit and proper persons to take and receive affidavits, affirmations, and declarations in Scotland and Ireland, and to perform the other duties of Masters Extraordinary of the High Court of Chancery in England, as he and they now have in any part of the kingdom of England.

2. [*Persons wilfully swearing falsely in any affidavit, etc., in Scotland deemed guilty of perjury, and liable to punishment in same manner as persons swearing falsely in open court.*]—And be it enacted, That all and every persons and person wilfully swearing or affirming or declaring falsely in any affidavit or affirmation or declaration to be made in that part of the United Kingdom called Scotland, before any person or persons who shall be empowered to take affidavits or affirmations or declarations in Scotland under the authority aforesaid, shall be deemed guilty of perjury, and shall be liable to prosecution and punishment for perjury in the same manner and to the same effect as if such persons or person had wilfully sworn falsely as a witness or witnesses in open court in any judicial proceeding in Scotland, or in any court of competent jurisdiction in that part of the United Kingdom in which such person shall be apprehended on such a charge; and it shall be competent to bring such prosecution, if brought in Scotland, either in the Court of Justiciary or in the Sheriff Court of the county within which the offence shall have been committed.

3. [*Persons wilfully swearing falsely in any affidavit or affirmation in*

Ireland deemed guilty of perjury, and liable to same pains and penalties as for swearing falsely in open court. False declaration, a misdemeanour.]

4. [*What fees may be taken.*]—And be it enacted, That every such person authorized to act under any such commission as aforesaid shall be entitled to receive and take such and the same fees, and none other, as Masters Extraordinary of the High Court of Chancery in England are now entitled to by virtue of the orders of that Court, or of any Act or Acts of Parliament now in force.

5. [*For compelling the attendance of witnesses.*]—And whereas there are at present no means of compelling the attendance of persons to be examined under any commission for the examination of witnesses issued by the Courts of law or equity in England or Ireland, or by the Courts of law in Scotland, to be executed in a part of the realm subject to different laws from that in which such commissions are issued, and great inconvenience may arise by reason thereof; be it therefore enacted, That if any person after being served with a written notice to attend any Commissioner or Commissioners appointed to execute any such commission for the examination of witnesses as aforesaid (such notice being signed by the Commissioner or Commissioners, and specifying the time and place of attendance), shall refuse or fail to appear and be examined under such commission, such refusal or failure to appear shall be certified by such commissioner or commissioners, and it shall thereupon be competent, to or on behalf of any party suing out such commission, to apply to any of the superior courts of law in that part of the kingdom within which such commission is to be executed, or any one of the judges of such Courts, for a rule or order to compel the person or persons so refusing or failing as aforesaid to appear before such commissioner or commissioners, and to be examined under such commission, and it shall be lawful for the court or judge to whom such application shall be made by rule or order to command the attendance and examination of any person to be named or the production of any writings or documents to be mentioned in such rule or order.

6. [*Punishment of Persons disobeying rule or order to appear or to produce writings or documents required.*]—And be it enacted, That upon the service of such rule or order upon the person named therein, if he or she shall not appear before such commissioner or commissioners as aforesaid for examination, or to produce the writings or documents mentioned in such rule or order, the disobedience to such rule or order shall, if the same shall happen in England or in Ireland, render the person disobeying subject and liable to such pains and penalties as he or she would be subject and liable to by reason of disobedience to a writ of subpœna in England or in Ireland, and if such disobedience shall happen in Scotland it shall be competent to the Lord Ordinary on the Bills, upon an application made to him by or on behalf of any party suing out such commission, and upon proof of such disobedience made before him, to direct the issue of letters of second diligence, according to the forms of the law of Scotland, to be used against the person disobeying such rule or order.

7. [*For payment of witnesses, etc.*]—Provided always, and be it enacted, That every person whose attendance shall be so required shall be entitled to the like conduct money and payment of expenses and for loss of time as for and upon attendance at any trial in a court of law; and that no person shall be compelled to produce under such rule or order any writing or other

document that he or she would not be compellable to produce at a trial, nor to attend on more than two consecutive days, to be named in such rule or order.

11 & 12 *Vict. c.* 42.—An ACT to facilitate the Performance of the Duties of Justices of the Peace out of Sessions, within England and Wales, with respect to Persons charged with Indictable Offences.—14th August 1848.

Sect. 14. [*English or Irish warrants may be backed in Scotland. Warrants so indorsed to be valid.*]—And be it declared and enacted, that if any person against whom a warrant shall be issued by any Justice of the Peace for any county or place within England, or Wales or Ireland only, any Judge of Her Majesty's Court of Queen's Bench, or Justice of Oyer and Terminer or Gaol Delivery in England or Ireland, for any crime or offence against the laws of those parts respectively of the United Kingdom of Great Britain and Ireland, shall escape, go into, reside, or be, or be supposed or suspected to be, in any place in that part of the said United Kingdom called Scotland, it shall be lawful for the Sheriff or Steward depute or substitute, or any Justice of the Peace of the county or place where such person or persons shall go into, reside, or be, or be supposed to be, to indorse (K) the said warrant in manner hereinbefore mentioned, or to the like effect, which warrant so indorsed shall be a sufficient authority to the person or persons bringing such warrant, and to all persons to whom such warrant was originally directed, and also to all Sheriff's officers, Steward's officers, constables, and other peace officers of the county or place where such warrant shall be so indorsed, to execute the same within the county or place where it shall have been so indorsed, by apprehending the person against whom such warrant shall have been granted, and to convey him into the county or place in England, Wales, or Ireland, where the Justice or Justices who first issued the said warrant shall have jurisdiction in that behalf, and to carry him before such Justice or Justices, or before any other Justice or Justices of the Peace of and for the same county or place, to be there dealt with according to law, and which said Justice or Justices are hereby authorized and required thereupon to proceed in such and the same manner as if the said offender had been apprehended within his or their jurisdiction.

Sect. 15. [*Scotch warrants may be backed in England or Ireland. Warrants so indorsed to be valid.*]—And be it enacted, that if any person against whom a warrant shall be issued by the Lord Justice-General, Lord Justice-Clerk, or any of the Lords Commissioners of Justiciary, or by any Sheriff or Steward depute or substitute, or Justice of the Peace, of that part of the United Kingdom of Great Britain and Ireland called Scotland, for any crime or offence against the laws of that part of the United Kingdom, shall escape, go into, reside, or be, or shall be supposed or suspected to be, in any county or place in England or in Ireland, it shall be lawful for any Justice of the Peace in and for the county or place into which such person shall escape or go, or where he shall reside or be, or shall be supposed or suspected to be, to indorse (K) the said warrant in manner hereinbefore mentioned; and

which said warrant so indorsed shall be a sufficient authority to the person or persons bringing the same, and to all persons to whom the same was originally directed, and also to all constables and other peace officers of the county or place where the Justice so indorsing such warrant shall have jurisdiction to execute the said warrant, in the county or place where it is so indorsed, by apprehending the person against whom such warrant shall have been granted, and to convey him into the county or place in Scotland next adjoining to that part of the United Kingdom called England, and carry him before the Sheriff or Steward depute or substitute, or one of the Justices of the Peace of such county or place, and which said Sheriff or Steward depute or substitute, or Justice of the Peace, is hereby authorized and required thereupon to proceed in such and the same manner, according to the rules and practice of the law of Scotland, as if the said defender had been apprehended within such county or place in Scotland last aforesaid.

(K) *Indorsement in backing a Warrant.*

—— to wit. Whereas proof upon oath hath this day been made before me, one of Her Majesty's Justices of the Peace for the said (*county*) of that the name of J. S. to the within warrant subscribed, is of the handwriting of the Justice of the Peace within mentioned; I do therefore hereby authorize W. T., who bringeth to me this warrant, and all other persons to whom this warrant was originally directed, or by whom it may lawfully be executed, and also all constables and other peace officers of the said (*county*) of to execute the same within the said last mentioned (*county*),* and to bring the said A. B., if apprehended within the same (*county*) before me, or before some other Justice or Justices of the Peace of the same county, to be dealt with according to law.

Given under my hand this day of 186 .

J. L.

Sect. 16. [*Power of Justices to summon witnesses to attend and give evidence. In certain cases warrant may be issued.*]—And be it enacted, That if it shall be made to appear to any Justice of the Peace, by the oath or affirmation of any credible person, that any person is likely to give material evidence for the prosecution, etc. . . . it shall be lawful for the Justice or Justices, etc., to issue a warrant under his or their hands and seals, to bring and have such person, at a time and place to be therein mentioned, before the Justice, etc., to testify as aforesaid, and which said warrant may, if necessary, be backed as hereinbefore is mentioned, in order to its being executed out of the jurisdiction of the Justice who shall have issued the same, etc.

12 & 13 *Vic. c.* 106.—An ACT to amend and consolidate the Laws relating to Bankrupts.—1st Aug. 1849.

Sect. 109. [*Messenger may break open the bankrupt's doors, etc., and seize upon his body or property.*]—That it shall be lawful for any messenger of

* *The words following this asterisk are to be used only where the Justice backing the warrant shall think fit, and may be omitted in backing English warrants in Ireland, Scotland, etc., or in backing Irish or Scotch warrants, etc., in England.*

the court and his assistants acting under warrant of the court to break open any house, chamber, shop, warehouse, door, trunk, or chest of any bankrupt where such bankrupt or any of his property shall be reputed to be, and seize upon the body or property of such bankrupt; and if the bankrupt be in prison or in custody, it shall be lawful for the messenger and his assistants to seize any property of the bankrupt (his necessary wearing apparel only excepted) in the custody or possession of such bankrupt or of any other person, in any prison or place where such bankrupt is in custody.

Sect. 111. [*Execution of warrant in Scotland.*]—That if in the execution of any such warrant of seizure granted by the court it shall be necessary to break open any house, chamber, shop, warehouse, door, trunk, or chest of the bankrupt in Scotland, where any of the property of such bankrupt shall be reputed to be, or to seize and get possession of such property, such warrant, after having been verified upon oath, may be backed or endorsed by any judge ordinary or justice of the peace in Scotland, who are hereby required, within their respective jurisdictions, to back or endorse the same; and such warrant so endorsed shall be sufficient authority to the messenger or his assistant bringing such warrant, and to all officers of the law in Scotland, to execute the same within the county or burgh wherein it is so endorsed, and in virtue thereof to break open the house, chamber, shop, warehouse, door, trunk, or chest of such bankrupt, and to seize and take possession of such property, to be distributed under the bankruptcy, or otherwise dealt with according to law.

Sect. 128. [*Where bankrupt beneficially entitled to stock, court may make order for transfer.*]—That if any bankrupt shall have any Government stock, funds, or annuities, or any of the stock of any public company, either in England, Scotland, or Ireland, standing in his name in his own right, it shall be lawful for the court, by writing, to order all persons whose act or consent is thereto necessary to transfer the same into the name of the assignees, and to pay all dividends upon the same to the official assignee; and all such persons whose act or consent is so necessary are hereby indemnified for all things done or permitted pursuant to such order.

Sect. 130. [*Where bankrupt is a trustee, the Lord Chancellor may order conveyance or assignment to another trustee.*]—That if any bankrupt shall as trustee be seised, possessed of, or entitled to, either alone or jointly, any real or personal estate, or any interest secured upon or arising out of the same, or shall have standing in his name as trustee, either alone or jointly, any Government stock, funds, or annuities, or any of the stock of any public company, either in England, Scotland, or Ireland, it shall be lawful for the Lord Chancellor, on the petition of the person entitled in possession to the receipt of the rents, issues, and profits, dividends, interest, or produce thereof, on due notice given to all other persons (if any) interested therein, to order the assignees and all persons whose act or consent thereto is necessary to convey, assign, or transfer the said estate, interest, stock, funds, or annuities, to such person as the Lord Chancellor shall think fit, upon the same trusts as the said estate, interest, stock, funds, or annuities were subject to before the bankruptcy, or such of them as shall be then subsisting and capable of taking effect, and also to receive and pay over the

rents, issues, and profits, dividends, interest, or produce thereof, as the Lord Chancellor shall direct.

Sect. 141. [*Personal estate to vest in assignees.*]—That when any person shall have been adjudged a bankrupt, all his personal estate and effects, present and future, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed or come to him, before he shall have obtained his certificate, and all debts due or to be due to him, wheresoever the same may be found or known, and the property, right, and interest in such debts, shall become absolutely vested in the assignees for the time being, for the benefit of the creditors of the bankrupt, by virtue of their appointment; and after such appointment, neither the bankrupt, nor any person claiming through or under him, shall have power to recover the same, nor to make any release or discharge thereof, neither shall the same be attached as the debt of the bankrupt by any person according to the custom of the city of London or otherwise, but such assignees shall have like remedy to recover the same in their own names as the bankrupt himself might have had if he had not been adjudged bankrupt.

Sect. 143. [*Where a conveyance of the property of a bankrupt would require to be registered, the certificate of appointment of the assignees shall be registered.*]—That where according to law any conveyance or assignment of any real or personal property of a bankrupt would require to be registered, enrolled, or recorded in any registry office in England, Wales, or Ireland, or in any registry office, court, or other place in Scotland, or in any of the dominions, plantations, or colonies belonging to Her Majesty, then in every such case the certificate of the appointment of assignees of the estate and effects of the bankrupt shall be registered in the registry office, court, or place wherein such conveyance or assignment would require to be registered, enrolled, or recorded, and such registry shall have the like effect to all intents and purposes as the registry, enrolment, or recording of such conveyance or assignment would have had; and the title of any purchaser of any such property for valuable consideration, without notice of the bankruptcy, who shall have duly registered, enrolled, or recorded his purchase deed previous to the registry hereby directed, shall not be invalidated by reason of such appointment of assignees, or of the vesting of such property in them consequent thereupon, unless the certificate of such appointment shall be registered as aforesaid within the times following; (that is to say), as regards the United Kingdom of Great Britain and Ireland, within two months from the date of such appointment, and as regards all other places within twelve months from the date thereof.

Sect. 200. [*Certificate to discharge bankrupt from all debts due by him when he became bankrupt.*]—That the certificate of conformity allowed under this Act, subject to the provisions herein contained, shall discharge the bankrupt from all debts due by him when he became bankrupt, and from all claims and demands made provable under the bankruptcy: Provided always, that no such certificate shall release or discharge any person who was a partner with such bankrupt at the time of his bankruptcy, or was then jointly bound or had made any joint contract with such bankrupt.

Sect. 237. [*Judicial notice to be taken of signature of commissioner or registrar, and of the seal of the court.*]—That all courts, judges, justices, and persons judicially acting, and other officers, shall take judicial notice of the signature of any commissioner or registrar of the court, and of the seal of the court, subscribed or attached to any judicial or official proceeding or document to be made or signed under the provisions of this Act.

Sect. 243. [*Before whom affidavits are to be sworn.*]—That all affidavits to be made or used in matters of bankruptcy, or in any matter or proceeding whatever under this Act, shall and may be sworn before the court, or any commissioner, registrar, or master thereof, or before a master in ordinary or extraordinary of the High Court of Chancery, or before any clerk of affidavits, assistant clerk, or second assistant clerk of affidavits of the High Court of Chancery, or in Scotland or Ireland before such master extraordinary aforesaid, or before a magistrate of the county, city, town, or place where any such affidavit shall be sworn, or elsewhere before a magistrate and attested by a notary, or before a British minister, consul, or vice-consul.

17 & 18 *Vict. c.* 34.—An ACT to enable the Courts of Law in England, Ireland, and Scotland, to issue process to compel the attendance of Witnesses out of their Jurisdiction, and to give effect to the Service of such Process in any Part of the United Kingdom.—July 10, 1854.

Whereas great inconvenience arises in the administration of justice from the want of a power in the superior courts of law to compel the attendance of witnesses resident in one part of the United Kingdom at a trial in another part, and the examination of such witnesses by commission is not in all cases a sufficient remedy for such inconvenience: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. [*Courts of law in England, Ireland, and Scotland, may issue process to compel the attendance of witnesses, although not within their jurisdiction.*]—If, in any action or suit now or at any time hereafter depending in any of her Majesty's superior courts of common law at Westminster or Dublin, or the Court of Session or Exchequer in Scotland, it shall appear to the court in which such action is pending, or, if such court is not sitting, to any judge of any of the said courts respectively, that it is proper to compel the personal attendance at any trial of any witness who may not be within the jurisdiction of the court in which such action is pending, it shall be lawful for such court or judge, if in his or their discretion it shall so seem fit, to order that a writ called a writ of *subpœna ad testificandum*, or of *subpœna duces tecum*, or warrant of citation shall issue in special form, commanding such witness to attend such trial, wherever he shall be within the United Kingdom, and the service of any such writ or process in any part of the United Kingdom shall be as valid and effectual to all intents and purposes as if same had been served within the jurisdiction of the court from which it issues.

2. [*Statement to be made at foot of writ that it is issued by special order.*]—Every such writ shall have at foot thereof a statement or notice that the

same is issued by the special order of the court or judge, as the case may be; and no such writ shall issue without such special order.

3. [*Witnesses making default to be punished by the courts of the country in which the process was served.*]—In case any person so served shall not appear according to the exigency of such writ or process, it shall be lawful for the court out of which the same issued, upon proof made of the service thereof, and of such default, to the satisfaction of the said court, to transmit a certificate of such default under the seal of the same court, or under the hand of one of the judges or justices of the same, to any of her Majesty's superior courts of common law at Westminster, in case such service was had in England, or in case such service was had in Scotland to the Court of Session or Exchequer at Edinburgh, or in case such service was had in Ireland to any of her Majesty's superior courts of common law at Dublin; and the court to which such certificate is so sent, shall and may thereupon proceed against and punish the person so having made default in like manner as they might have done, if such person had neglected or refused to appear in obedience to a writ of subpœna, or other process issued out of such last-mentioned court.

4. [*Persons not to be punished if it shall appear that sufficient money has not been tendered to pay expenses.*]—None of the said courts shall in any case proceed against, or punish any person for having made default by not appearing to give evidence in obedience to any writ of subpœna or other process issued under the powers given by this Act, unless it shall be made to appear to such court that a reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence, and of returning from giving such evidence, had been tendered to such person at the time when such writ of subpœna or process was served upon such person.

5. [*Act not to prevent the issuing of a commission to examine witnesses.*] Nothing herein contained shall alter or affect the power of any of such courts to issue a commission for the examination of witnesses out of their jurisdiction, in any case in which, notwithstanding this Act, they shall think fit to issue such commission.

6. [*Not to affect the admissibility of evidence where now receivable.*]—Nothing herein contained shall alter or affect the admissibility of any evidence at any trial where such evidence is now by law receivable, on the ground of any witness being beyond the jurisdiction of the court, but the admissibility of all such evidence shall be determined as if this Act had not passed.

19 & 20 *Vict. c.* 60.—An ACT to amend the Laws of Scotland affecting Trade and Commerce.—21st July 1856.

'Whereas inconvenience is felt by persons engaged in trade by reason of 'the laws of Scotland being in some particulars different from those of 'England and Ireland in matters of common occurrence in the course of 'such trade, and with a view to remedy such inconvenience it is expedient 'to amend the law of Scotland as hereinafter is mentioned:' Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. [*Goods sold, but not delivered, not to be attachable by creditors of the seller.*] —From and after the passing of this Act, where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing delivery of the same; and the right of the purchaser to demand delivery of such goods shall from and after the date of such sale be attachable by or transferable to the creditors of the purchaser.

2. [*Seller not entitled to a right of retention generally against second purchaser.*] Where a purchaser of goods who has not obtained delivery thereof shall after the passing of this Act sell the same, the purchaser from him or any other subsequent purchaser shall be entitled to demand that delivery of the said goods shall be made to him and not to the original purchaser; and the seller, on intimation being made to him of such subsequent sale, shall be bound to make such delivery, on payment of the price of such goods, or performance of the obligations or conditions of the contract of sale, and shall not be entitled, in any question with a subsequent purchaser, or others in his right, to retain the said goods for any separate debt or obligation alleged to be due to such seller by the original purchaser: Provided always, that nothing in this Act contained shall prejudice or affect the right of retention of the seller for payment of the purchase price of the goods sold, or such portion thereof as may remain unpaid, or for performance of the obligations or conditions of the contract of sale, or any right of retention competent to the seller except as between him and such subsequent purchaser, or any such right of retention arising from express contract with the original purchaser.

3. [*Arrestment and poinding of goods by seller.*]—Any seller of goods may attach the same while in his own hands or possession, by arrestment or poinding, at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller, and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party.

4. [*Rights of landlord not to be affected.*]—Nothing hereinbefore contained shall prejudice or affect the landlord's right of hypothec and sequestration for rent.

5. [*Seller not held to warrant goods except there be an express warranty in contract.*]—Where goods shall, after the passing of this Act, be sold, the seller, if at the time of the sale he was without knowledge that the same were defective or of bad quality, shall not be held to have warranted their quality or sufficiency, but the goods, with all faults, shall be at the risk of the purchaser, unless the seller shall have given an express warranty of the quality or sufficiency of such goods, or unless the goods have been expressly sold for a specified and particular purpose, in which case the seller shall be considered, without such warranty, to warrant that the same are fit for such purpose.

6. [*Guarantees, etc., to be in writing.*]—From and after the passing of this Act, all guarantees, securities, or cautionary obligations made or granted by any person for any other person, and all representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person, made or granted to the effect or for the purpose of enabling such person to

obtain credit, money, goods, or postponement of payment of debt, or of any other obligation demandable from him, shall be in writing, and shall be subscribed by the person undertaking such guarantee, security, or cautionary obligation, or making such representations and assurances, or by some person duly authorized by him or them, otherwise the same shall have no effect.

7. [*Guarantees to or for a firm not to be binding after any change of the firm, except in special cases.*]—No guarantee, security, cautionary obligation, representation, or assurance granted or made after the passing of this Act to or for a company or firm consisting of two or more persons, or to or for a single person trading under the name of a firm, shall be binding on the granter or maker of the same in respect of anything done or omitted to be done, after a change shall have taken place in any one or more of the partners of the company or firm to which the same has been granted or made, or of the company or firm for which the same has been granted or made: Unless the intention of the parties, that such guarantee, security, cautionary obligation, representation, or assurance, shall continue to be binding, notwithstanding such change, shall appear either by express stipulation, or by necessary implication from the nature of the firm or otherwise.

8. [*Cautioners not to be entitled to benefit of discussion.*]—Where any person shall, after the passing of this Act, become bound as cautioner for any principal debtor, it shall not be necessary for the creditor to whom such cautionary obligation shall be granted, before calling on the cautioner for payment of the debt to which such cautionary obligation refers, to discuss or do diligence against the principal debtor, as now required by law; but it shall be competent to such creditor to proceed against the principal debtor and the said cautioner, or against either of them, and to use all action or diligence against both or either of them which is competent according to the law of Scotland: Provided always, that nothing herein contained shall prevent any cautioner from stipulating in the instrument of caution that the creditor shall be bound before proceeding against him to discuss and do diligence against the principal debtor.

9. [*Discharge of one cautioner to operate as a discharge to all.*]—From and after the passing of this Act, where two or more parties shall become bound as cautioners for any debtor, any discharge granted by the creditor in such debt or obligation to any one of such cautioners without the consent of the other cautioners shall be deemed and taken to be a discharge granted to all the cautioners; but nothing herein contained shall be deemed to extend to the case of a cautioner consenting to the discharge of a co-cautioner who may have become bankrupt.

10. [*Date of bills or notes may be proved by parole.*]—From and after the passing of this Act, where any bill of exchange or promissory-note shall be issued without date, it shall be competent to prove by parole evidence the true date at which such bill or note was issued: Provided always, that summary diligence shall not be competent on any bill or note issued without a date.

11. [*Acceptance of bill of exchange must be in writing.*]—No acceptance of any bill of exchange, whether inland or foreign, made after the thirty-first day of December one thousand eight hundred and fifty-six, shall be sufficient to bind or charge any person unless the same be in writing on such bill, or if there be more than one part of such bill, on one of the said parts, and signed by the acceptor or some person duly authorized by him.

12. [*All bills drawn within the United Kingdom, etc., to be held inland bills.*]—Every bill of exchange drawn in any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them, being part of the dominions of Her Majesty, and made payable in, or drawn upon any person resident in any part of the said United Kingdom or islands, shall be deemed to be an inland bill; but nothing herein contained shall alter or affect the stamp duty, if any, which but for this enactment would be payable in respect of any such bill.

13. [*Notarial protest not to be necessary, except for the purpose of summary diligence.*]—From and after the passing of this Act, where any inland bill of exchange shall be presented for acceptance or payment, and the same shall be dishonoured by not being accepted or paid, or where any promissory-note shall be presented for payment, and dishonoured by not being paid, it shall not be necessary that a notarial protest shall be taken on such bill of exchange or promissory-note in order to preserve recourse against the drawer or indorser of such bill or promissory-note respectively; but it shall be sufficient to prove such presentment and dishonour, to the effect of preserving recourse, as aforesaid, by other competent evidence, either written or parole: Provided always, that nothing herein contained shall be taken to affect the necessity for a notarial protest in order to entitle the holder of any bill or note to proceed with summary diligence thereon.

14. [*Notice of dishonour in the case of inland bills to be given as in the case of foreign bills.*]—Where any inland bill of exchange shall be presented for acceptance or payment, and such acceptance or payment shall be refused, or where any promissory-note shall be presented for payment, and payment shall be refused, notice of the dishonour of such bill or promissory-note by such refusal to accept or pay shall, in order to entitle the holder to have recourse to any other party, be given in the same manner, and within the same time as is required in the case of foreign bills by the law of Scotland.

15. [*When bill lost, stolen, or fraudulently obtained, holder must prove value given.*]—Where any bill or note has been lost, stolen, or fraudulently obtained, the holder of such bill or note suing or doing diligence thereon, shall be bound to prove that value was given by him for the same; but such proof may be made by parole evidence.

16. [*Holder of bill or note indorsed after period of payment to be subject to objections, etc.*]—When any bill of exchange or promissory-note shall, after the passing of this Act, be indorsed after the period when such bill of exchange or promissory-note became payable, the indorsee of such bill or note shall be deemed to have taken the same, subject to all objections or exceptions to which the said bill or note was subject in the hands of the indorser.

17. [*Carriers to be liable for losses by accidental fires.*]—From and after the passing of this Act, all carriers for hire of goods within Scotland shall be liable to make good to the owner of such goods all losses arising from accidental fire while such goods were in the custody or possession of such carriers.

18. [*Every port in United Kingdom, etc. to be deemed a home port.*]—In relation to the rights and remedies of persons having claims for repairs done to, or supplies furnished to, or for ships every port within the United King-

dom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them, being part of the dominions of Her Majesty, shall be deemed a home port.

19. [*Court of Session to make regulations for carrying Act into effect.*]—The Court of Session is hereby empowered from time to time, after the passing of this Act, to make such regulations by Act or Acts of Sederunt, as the said Court may deem meet for carrying into effect the purposes of this Act: Provided always, that within fourteen days from the commencement of any future Session of Parliament, there shall be transmitted to both Houses of Parliament, copies of all Acts of Sederunt made and passed under the powers hereby given.

20. [*Title of Act.*]—In citing this Act it shall be sufficient to use the expression, "The Mercantile Law Amendment Act, Scotland, 1856."

21. [*Act to apply to Scotland only.*]—Nothing in this Act contained shall apply to any part of the United Kingdom except Scotland.

19 & 20 *Vict. c.* 97.—An ACT to amend the Laws of England and Ireland affecting Trade and Commerce.—29th July 1856.

'Whereas inconvenience is felt by persons engaged in trade by reason 'of the laws of England and Ireland being in some particulars different from 'those of Scotland in matters of common occurrence in the course of such 'trade, and with a view to remedy such inconvenience it is expedient to 'amend the laws of England and Ireland as hereinafter is mentioned:' Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. [*Persons acquiring title to goods before they have been seized or attached under a writ against the seller protected.*]—No writ of fieri facias or other writ of execution, and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person *bona fide* and for a valuable consideration before the actual seizure or attachment thereof by virtue of such writ; provided such person had not, at the time when he acquired such title, notice that such writ, or any other writ by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the hands of the Sheriff, Under Sheriff, or Coroner.

2. [*Specific delivery of goods sold.*]—In all actions and suits in any of the Superior Courts of Common Law at Westminster or Dublin, or in any Court of Record in England, Wales, or Ireland, for breach of contract to deliver specific goods for a price in money, on the application of the plaintiff, and by leave of the judge before whom the cause is tried, the jury shall, if they find the plaintiff entitled to recover, find by their verdict what are the goods in respect of the non-delivery of which the plaintiff is entitled to recover and which remain undelivered; what (if any) is the sum the plaintiff would have been liable to pay for the delivery thereof; what damages (if any) the plaintiff would have sustained if the goods should be delivered under execution, as herein-after mentioned, and what damages, if not so delivered; and thereupon, if judgment shall be given for the plaintiff, the

Court, or any judge thereof, at their or his discretion, on the application of the plaintiff, shall have power to order execution to issue for the delivery, on payment of such sum (if any) as shall have been found to be payable by the plaintiff as aforesaid, of the said goods, without giving the defendant the option of retaining the same upon paying the damages assessed; and such writ of execution may be for the delivery of such goods; and if such goods so ordered to be delivered, or any part thereof, cannot be found, and unless the Court, or such judge or baron as aforesaid, shall otherwise order, the Sheriff, or other officer of such Court of Record, shall distrain the defendant by all his lands and chattels in the said Sheriff's bailiwick, or within the jurisdiction of such other Court of Record, till the defendant deliver such goods, or, at the option of the plaintiff, cause to be made of the defendant's goods the assessed value or damages, or a due proportion thereof; provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods, the damages, costs, and interest in such action or suit.

3. [*Consideration for guarantee need not appear by writing.*]—No special promise to be made by any person after the passing of this Act to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.

4. [*Guarantee to or for a firm to cease upon a change in the firm, except in special cases.*]—No promise to answer for the debt, default, or miscarriage of another made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default, or miscarriage of a firm consisting of two or more persons, or of a single person trading under the name of a firm, shall be binding on the person making such promise in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of a firm, unless the intention of the parties, that such promise shall continue to be binding notwithstanding such change, shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise.

5. [*A surety who discharges the liability to be entitled to assignment of all securities held by the creditor.*]—Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such

surety shall not be pleadable in bar of any such action or other proceeding by him: Provided always, that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable.

6. [*Acceptance of a bill inland or foreign to be in writing on it, and signed.*]—No acceptance of any bill of exchange, whether inland or foreign, made after the thirty-first day of December one thousand eight hundred and fifty-six, shall be sufficient to bind or charge any person, unless the same be in writing on such bill, or, if there be more than one part of such bill, on one of the said parts, and signed by the acceptor or some person duly authorized by him.

7. [*What are to be deemed "inland bills."*]—Every bill of exchange or promissory-note drawn or made in any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them, being part of the dominions of Her Majesty, and made payable in or drawn upon any person resident in any part of the said United Kingdom or islands, shall be deemed to be an inland bill; but nothing herein contained shall alter or affect the stamp duty, if any, which, but for this enactment, would be payable in respect of any such bill or note.

8. [*With reference to the repairs of ships, every port within the United Kingdom, etc., a home port.*]—In relation to the rights and remedies of persons having claims for repairs done to, or supplies furnished to or for ships, every port within the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them, being part of the dominions of Her Majesty, shall be deemed a home port.

9. [*Limitation of actions for "merchants' accounts."*]—All actions of account or for not accounting, and suits for such accounts, as concern the trade of merchandise between merchant and merchant, their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits, or when such cause has already arisen then within six years after the passing of this Act; and no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action or suit.

10. [*Absence beyond seas or imprisonment of a creditor not to be a disability.*]—No person or persons who shall be entitled to any action or suit with respect to which the period of limitation within which the same shall be brought is fixed by the Act of the twenty-first year of the reign of King James the First, chapter sixteen, section three, or by the Act of the fourth year of the reign of Queen Anne, chapter sixteen, section seventeen, or by the Act of the fifty-third year of the reign of King George the Third, chapter one hundred and twenty-seven, section five, or by the Acts of the third and fourth years of the reign of King William the Fourth, chapter twenty-seven, sections forty, forty-one, and forty-two, and chapter forty-two, section three, or by the Act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section

twenty, shall be entitled to any time within which to commence and sue such action or suit beyond the period so fixed for the same by the enactments aforesaid, by reason only of such person, or some one or more of such persons, being at the time of such cause of action or suit accrued beyond the seas, or in the cases in which, by virtue of any of the aforesaid enactments imprisonment is now a disability, by reason of such person or some one or more of such persons being imprisoned at the time of such cause of action or suit accrued.

11. [*Period of limitation to run as to joint debtors in the kingdom, etc.; judgment recovered against joint debtors in the kingdom to be no bar to proceeding against others beyond seas after their return.*]—Where such cause of action or suit with respect to which the period of limitation is fixed by the enactments aforesaid or any of them lies against two or more joint debtors, the person or persons who shall be entitled to the same shall not be entitled to any time within which to commence and sue any such action or suit against any one or more of such joint debtors who shall not be beyond the seas at the time such cause of action accrued by reason only that some other one or more of such joint debtors was or were at the time such cause of action accrued beyond the seas, and such person or persons so entitled as aforesaid shall not be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond seas at the time the cause of action or suit accrued after his or their return from beyond seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid.

12. [*Definition of "beyond seas," within 4 & 5 Anne, c. 16, and this Act.*]—No part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of Her Majesty, shall be deemed to be beyond seas within the meaning of the Act of the fourth and fifth years of the reign of Queen Anne, chapter sixteen, or of this Act.

13. [*Provisions of 9 G. IV. c. 14, ss. 1 & 8, and 16 & 17 Vict. c. 113, ss. 24 & 27, extended to acknowledgments by agents.*]—In reference to the provisions of the Acts of the ninth year of the reign of King George the Fourth, chapter fourteen, sections one and eight, and the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, sections twenty-four and twenty-seven, an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorized to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself.

14. [*Part payment by one contractor, etc., not to prevent bar by certain statutes of limitations in favour of another contractor, etc.*]—In reference to the provisions of the Acts of the twenty-first year of the reign of king James the First, chapter sixteen, section three, and of the Act of the third and fourth years of the reign of king William the Fourth, chapter forty-two, section three, and of the Act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section twenty, when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor, or administrator shall lose the benefit of the said enactments or any of them, so as to

be chargeable in respect or by reason only of payment of any principal, interest, or other money, by any other or others of such co-contractors or co-debtors, executors, or administrators.

15. [*Rules and regulations may be made, and writs and proceedings framed, for the purposes of this Act.*]—In order to enable the superior courts of common law at Westminster and Dublin, and the judges thereof respectively, to make rules and regulations, and to frame writs and proceedings, for the purpose of giving effect to this Act, the two hundred and twenty-third and two hundred and twenty-fourth sections of "The Common Law Procedure Act, 1852," shall, so far as this Act is to take effect in England, and the two hundred and thirty-third and two hundred and fortieth sections of "The Common Law Procedure Amendment Act (Ireland), 1853," shall, so far as this Act is to take effect in Ireland, be incorporated with this Act, as if those provisions had been severally herein repeated and made to apply to this Act.

16. [*Short title.*]—In citing this Act it shall be sufficient to use the expression, "The Mercantile Law Amendment Act, 1856."

17. [*Extent of Act.*]—Nothing in this Act shall extend to Scotland.

19 & 20 *Vict. c.* 79.—An ACT to consolidate and amend the Laws relating to Bankruptcy in Scotland.—29th July 1856.

Sect. 22. [*Oath to be to verity of debts and extent of securities*].—Such oath, in the case of a creditor residing within the kingdom of Great Britain and Ireland, shall be taken by him before a judge ordinary, magistrate, or justice of the peace, to the verity of the debt claimed by him; and he shall in such oath state what other persons, if any, are, besides the bankrupt, liable for the debt or any part thereof, and specify any security which he holds over the estate of the bankrupt or of other obligants, and depone that he holds no other obligants or securities than those specified; and where he holds no other person than the bankrupt so bound, and no security, he shall depone to that effect.

Sect. 23. [*How taken, when creditor out of Great Britain or Ireland.*]—Such oath, in the case of a creditor who is out of the kingdom of Great Britain and Ireland, shall be taken by him to the verity of the debt in the manner above provided before a magistrate or justice of the peace, or other person qualified to administer oaths in the country where he resides (he being certified to be a magistrate or justice of the peace, or qualified as aforesaid, by a British minister or British consul, or by a notary public), or his known agent or mandatory in Great Britain or Ireland shall make an oath of credulity in the manner and to the effect before provided.

Sect. 47. [*Effect of warrant of protection or liberation.*]—The warrant granting protection or liberation, or a copy thereof, certified by one of the Bill Chamber clerks if it is granted by the Lord Ordinary, or by the sheriff clerk if it is granted by the sheriff, shall protect or liberate the debtor from arrest or imprisonment in Great Britain and Ireland and Her Majesty's other dominions, for civil debt contracted previous to the date of sequestration, and all courts of justice and judges and all officers and gaolers shall be bound to

give effect to such warrant; but such warrant of protection or liberation shall not be of any effect against the execution of a warrant of apprehension or imprisonment in meditatione fugæ or ad factum præstandum, or for any criminal act.

Sect. 73. [*Act and warrant in favour of trustee. To be a complete title to him.*] —On the decision of the sheriff being given, declaring the person elected trustee, and on a bond by the trustee and his cautioner being duly lodged as aforesaid, the sheriff shall confirm his election as trustee, which confirmation shall be final, and not subject to review in any court or in any manner whatever; and the sheriff clerk shall issue an act and warrant in the form of schedule (D) hereunto annexed to the trustee, and the trustee shall immediately transmit a copy of such act and warrant to the accountant, who shall make an entry of the name and designation of the trustee in the register of sequestrations, and such act and warrant shall be an effectual title to the trustee to perform the duties hereby imposed on him, and shall be evidence of his right and title to the sequestrated estate, for the purposes of this Act; and a copy of such act and warrant in favour of the trustee, purporting to be certified by the sheriff clerk, and to be authenticated by one of the judges of the Court of Session, shall be received in all courts and places within England, Ireland, and her Majesty's other dominions as *prima facie* evidence of the title of the trustee, without proof of the authenticity of the signatures or of the official character of the persons signing, and shall entitle the trustee to recover any property belonging or debt due to the bankrupt and to maintain actions, in the same way as the bankrupt might have done if his estate had not been sequestrated.

SCHEDULE D.

Act and Warrant of Confirmation of the Trustee.

(*Place and date.*)

The sheriff of the county of (*insert county*) has confirmed, and hereby confirms A. B. (*name and designation*), trustee on the sequestrated estate of C. D. (*name and designation*), and the whole of the estates and effects, heritable and moveable, and real and personal, wherever situated, of the said C. D., are transferred and belong to A. B., as trustee for behoof of the creditors of the said C. D., in terms of the "Bankruptcy (Scotland) Act, 1856;" and the said A. B. has, as trustee aforesaid, in terms of the said Act, full right and power to sue for and recover all estates, effects, debts, and money, belonging or due to the said C. D.

(Signed) E. F., *Sheriff Clerk.*

Sect. 89. [*Apprehension and transmission of the bankrupt when out of Scotland.*]—If the bankrupt be in any part of Great Britain and Ireland other than Scotland, the Lord Ordinary may, on petition by the trustee, grant warrant to all judges, magistrates, justices of the peace, and officers of the law, to apprehend and transmit him to the place of his examination, and to enforce the same, which they are hereby required to do; and if the bankrupt be in prison or custody, the Lord Ordinary may grant warrant as aforesaid to magistrates and gaolers, upon receiving a duplicate of such warrant, and an acknowledgment for the person of the bankrupt, to deliver him to the messenger or officer presenting such warrant, which they shall do

accordingly; and such warrant shall be sufficient authority for the apprehension, transmission, detention, and imprisonment of the bankrupt (when necessary for his safe custody), and for his re-transmission after examination to and re-imprisonment in the prison or custody from which he was delivered up.

Sect. 90. [*Examination of bankrupt's wife and others.*]—The sheriff may, at any time, on the application of the trustee, order an examination of the bankrupt's wife and family, clerks, servants, factors, law agents, and others, who can give information relative to his estate, on oath, and issue his warrant requiring such persons to appear; and if they refuse or neglect to appear, when duly summoned, the sheriff may issue another warrant to apprehend the person so failing to appear: Provided that when such person is not the bankrupt, nor his wife, nor one of his family, nor his clerk or servant, no warrant for apprehension shall be issued until the expiration of eight days from the service of the first warrant, unless the trustee shall, on oath, specify a reasonable cause of belief that such person intends to leave the country to avoid the examination, in which case the sheriff may forthwith issue such warrant; which several warrants shall be sufficient to authorize messengers-at-arms, or the officers of the sheriff, to execute the same, either within or without the territory of the sheriff in Scotland as aforesaid; and if any person liable to be examined cannot attend, the sheriff may grant commission to take his examination; and such examination, whether by the sheriff or by a commissioner, may be adjourned, if it shall seem fit, to an early day, to be then fixed: Provided that persons, other than the bankrupt, summoned to attend for examination shall be entitled to such allowances as witnesses are in other cases entitled to, and the amount of which, if disputed, shall be fixed by the sheriff.

Sect. 102. [*Vesting of estate in trustee.*]—The act and warrant of confirmation in favour of the trustee shall, *ipso jure*, transfer to and vest in him or any succeeding trustee, for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration, with all right, title, and interest, the whole property of the debtor, to the effect following:—

1st, [*Vesting of moveable estate.*]—The moveable estate and effects of the bankrupt, wherever situated so far as attachable for debt, to the same effect as if actual delivery or possession had been obtained, or intimation made at that date, subject always to such preferable securities as existed at the date of the sequestration, and are not null or reducible:

2d, [*Vesting of heritable estate in Scotland.*]—The whole heritable estate belonging to the bankrupt in Scotland, to the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt, subject to no legal reversion, had been pronounced in favour of the trustee, and recorded at the date of the sequestration, and as if a poinding of the ground had then been executed, subject always to such preferable securities as existed at the date of the sequestration, and are not null and reducible, and the creditors' right to poind the ground, as hereinafter provided; and the right of the trustee shall not be challengeable on the ground of any prior inhibition (saving the effect which such

inhibition may be entitled to in the ranking of the creditors): Provided always, that such transfer and vesting of the heritable estate shall have no effect upon the rights of the superior, nor upon any question of succession between the heir and executor of any creditor claiming on the sequestrated estate, nor upon the rights of the creditors of the ancestor (except that the act and warrant of confirmation shall operate in their favour as complete diligence); and if any part of the bankrupt's estate be held under an entail or by a title otherwise limited, the right vested in the trustee shall be effectual only to the extent of the interest in the estate which the bankrupt might legally convey, or the creditors attach:

3d, [*Vesting of real estates in England, Ireland, and other British dominions.*]—All real estate situated in England, Ireland, or in any of Her Majesty's dominions, belonging to the bankrupt, and all interest in or regarding such real estate, which the bankrupt held, or to which he was entitled: Provided always, that as regards all freehold, copyhold, and leasehold estate in England, Ireland, or any of Her Majesty's dominions (except Scotland), the act and warrant of confirmation shall be registered in the Chief Court of Bankruptcy for the country in which the property is situated, in the like manner as an adjudication of bankruptcy or other similar process ought to be registered according to the law of that country, either in a separate book, or in the general book, as the Court of Bankruptcy shall order, to the intent that all persons concerned may have the same means of ascertaining whether any person has been adjudged a bankrupt according to the law of Scotland as they have or shall have of ascertaining whether any person has been adjudged a bankrupt according to the law for the time being of the country in which the property is situated; and no purchaser for valuable consideration of any freehold, copyhold, or leasehold estate (except in Scotland) shall be affected by any such bankruptcy until the act and warrant of confirmation shall have been so registered as aforesaid: Provided also, that where, according to the laws of England, Ireland, or other Her Majesty's dominions, any deed or conveyance would require registration, enrolment, or recording, the act and warrant of confirmation shall be so registered, enrolled, or recorded according to the laws of England, Ireland, or other Her Majesty's dominions; and if any purchase is made by any person for valuable consideration, and without notice of the sequestration, prior to the registration, enrolment, or recording of the said act and warrant of confirmation, such purchase shall not be invalidated by the existence of such act and warrant, or the subsequent registration, enrolment, or recording thereof.

Sect. 140. [*Bankrupt on making declaration or oath to obtain his discharge.*]—On such deliverance being pronounced, approving of the composition in either of the cases above specified, the bankrupt, or if deceased his successor or other party offering the composition, shall make a declaration, or if required by the trustee or any creditor, an oath before the Lord Ordinary or the sheriff (as the case may be), that he has made a full and fair surrender of his estate, and has not granted or promised any preference

or security, or made or promised any payment, or entered into any secret or collusive agreement or transaction, to obtain the concurrence of any creditor to such offer and security; and if the bankrupt shall be at the time beyond the jurisdiction of the Lord Ordinary or sheriff, or is by a lawful cause prevented from appearing before the Lord Ordinary or sheriff, commission may be granted to any fit person to take such declaration or oath; and the Lord Ordinary or the sheriff (as the case may be), on being satisfied with such oath or declaration, shall pronounce a deliverance discharging the bankrupt of all debts and obligations contracted by him, or for which he was liable at the date of the sequestration, and shall declare the sequestration to be at an end, and the bankrupt re-invested in his estate (reserving always the claims of the creditors, for the said composition against him and the cautioner); and the bond of caution shall be recorded in the books of the Court of Session, or, when such deliverance is pronounced by the sheriff, in the books of the sheriff-court; and an extract of such deliverance, signed by the clerk of the bills or the sheriff-clerk, shall forthwith be transmitted to the accountant, who shall preserve the same, with the copy of the proceedings in the sequestration transmitted to him, as herein provided; and the clerk of the bills or the sheriff-clerk shall also issue an abbreviate of such deliverance in the form of schedule ( ) hereto annexed, which abbreviate shall be recorded in the register of inhibitions and the register of abbreviates of adjudications at Edinburgh, and the keepers of the said registers, if required, shall grant certificates of such registration in the form of schedule ( ) hereto annexed; and such deliverance of the Lord Ordinary or of the sheriff shall operate as a complete discharge and acquittance to the bankrupt in terms thereof, and shall receive effect within Great Britain and Ireland and her Majesty's other dominions, and an entry thereof shall be made by the accountant in the register of sequestrations.

Sect. 174. [*Deliverances, extracts, and copies shall form evidence.*]—All deliverances under this Act purporting to be signed by the Lord Ordinary, or by any of the Judges of the Court of Session, or by the sheriff, as well as all extracts or copies thereof or from the books of the Court of Session or the sheriff-court purporting to be signed or certified by any clerk of court, or extracts from or copies of registers purporting to be made by the keeper thereof, or extractor, shall be judicially noticed by all courts and judges in England, Ireland, and Her Majesty's other dominions, and shall be received as *prima facie* evidence, without the necessity of proving their authenticity or correctness, or the signatures appended, or the official character of the persons signing, and shall be sufficient warrants for all diligence and execution by law competent.

21 & 22 *Vict. c.* 56.—An ACT to amend the Law relating to the Confirmation of Executors in Scotland, and to extend over all Parts of the United Kingdom the effect of such Confirmation, and of Grants of Probate and Administration.—23d July 1858.

Whereas it is expedient to amend the law relating to the confirmation of executors in Scotland, and to extend over the United Kingdom the effect

of such confirmation, and of grants of probate and administration: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. *Practice of raising edicts of executry to cease.*

2. *Petition to commissary to be substituted. Form of petition as in schedule* (A).

3. *To whom petition to be presented.*

4. *Mode of intimating petition.*

5. *Certificate of intimation of petition. Additional intimation of petition in certain cases.*

6. *Procedure on petition. Decree-dative. Proviso as to caution.*

7. *Not to affect present procedure.*

8. [*Where inventories, etc., may be recorded. Confirmations may be granted.*]—Inventories of personal estates of deceased persons and relative testamentary writings may be given up and recorded in, and confirmations may be granted and issued by, any commissary court to which it is competent to apply in virtue of the provisions of this Act for the appointment of an executor-dative to the deceased.

9. [*Inventory may include personal estate in any part of United Kingdom.*]—From and after the date aforesaid it shall be competent to include in the inventory of the personal estate and effects of any person who shall have died domiciled in Scotland any personal estate or effects of the deceased situated in England or in Ireland, or both: provided that the person applying for confirmation shall satisfy the commissary, and that the commissary shall by his interlocutor find that the deceased died domiciled in Scotland, which interlocutor shall be conclusive evidence of the fact of domicile: provided also, that the value of such personal estate and effects situated in England or Ireland respectively shall be separately stated in such inventory, and such inventory shall be impressed with a stamp corresponding to the entire value of the state and effects included therein, wheresoever situated within the United Kingdom.

10. [*Form and effect of confirmation.*]—Confirmations shall be in the form, or as nearly as may be in the form, of schedules (D) and (E) hereunto annexed; and such confirmations shall have the same force and effect with the like writs framed in terms of the acts of sederunt passed on the twentieth December one thousand eight hundred and twenty-three, and the twenty-fifth February one thousand eight hundred and twenty-four, or at present in use.

11. [*Oaths, before whom to be taken.*]—Oaths and affirmations on inventories of personal estates given up to be recorded in any commissary court may be taken either before the commissary or his depute, or the commissary clerk or his depute, or before any commissioner appointed by the commissary, or before any magistrate or justice of the peace within the United Kingdom or the colonies, or any British consul.

12. [*Confirmation produced in Probate Court of England, and sealed, to have the effect of probate or administration.*]—From and after the date aforesaid, when any confirmation of the executor of a person who shall in manner aforesaid be found to have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in England, shall be produced in the Principal Court of Probate in England,

and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commissary finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said court, and returned to the person producing the same, and shall thereafter have the like force and effect in England as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate.

13. [*Confirmation produced in Probate Court of Dublin, and sealed, to have the effect of probate or administration.*]—From and after the date aforesaid, where any confirmation of the executor of a person who shall so be found to have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in Ireland, shall be produced in the Court of Probate in Dublin, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commissary finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said court, and returned to the person producing the same, and shall thereafter have the like force and effect in Ireland as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate in Dublin.

14. [*Probate or letters of administration produced in Commissary Court and certified, to have effect of confirmation.*]—From and after the date aforesaid, when any probate or letters of administration to be granted by the Court of Probate in England to the executor or administrator of a person who shall be therein, or by any note or memorandum written thereon signed by the proper officer, stated to have died domiciled in England, or by the Court of Probate in Ireland, to the executor or administrator of a person who shall in like manner be stated to have died domiciled in Ireland, shall be produced in the Commissary Court of the county of Edinburgh, and a copy thereof deposited with the commissary clerk of the said court; the commissary clerk shall endorse, or write on the back or face of such grant, a certificate in the form or as near as may be of the schedule (F) hereunto annexed; and such probate or letters of administration, being duly stamped, shall be of the like force and effect, and have the same operation in Scotland as if a confirmation had been granted by the said court.

15. [*For securing the stamp duties, probates, etc., to be deemed granted for all the property in the United Kingdom. Inventory to include all such property*].—In any of the aforesaid cases where the deceased person shall be stated in or upon the probate or letters of administration to have been domiciled in England or Ireland, as the case may be, such probate or letters of administration shall, for the purpose of securing the payment of the full and proper stamp duties, be deemed and considered to be granted for, and in respect of, the whole of the personal and moveable estate and effects of the deceased in the United Kingdom, within the meaning of the Act of Parliament passed in the fifty-fifth year of the reign of king George the Third, chapter one hundred and eighty-four, and of all other Acts of Parliament granting or relating to stamp duties on probates and letters of administration in England and Ireland respectively; and the affidavit required by law to be made on applying for probate or letters of administration in England or Ireland as to the value of the estate and effects of the deceased; and also where the commissary shall, in manner aforesaid, find that the

deceased was domiciled in Scotland, the inventory required by law to be exhibited and recorded in the proper Commissary Court in Scotland before obtaining confirmation, or intermitting with or entering upon the possession or management of the personal or moveable estate or effects of the deceased in Scotland, shall respectively extend to, and include the whole of the personal and moveable estate of the deceased person in the United Kingdom, and the value thereof; and the stamp duties for the time being chargeable on probates and letters of administration, and on inventories respectively, shall be chargeable upon any probate or letters of administration to be granted, and any inventory to be exhibited and recorded as aforesaid respectively, for, and in respect of, the whole of the personal and moveable estate and effects of the deceased in the United Kingdom and the value thereof; and the said affidavit shall also separately specify the value of the said estate and effects in Scotland.

16. [*Provisions of former Acts to apply to the probates, letters of administration, and inventories mentioned in this Act.*]—For the purpose aforesaid, and also for granting relief where too high a stamp duty shall have been paid on any such probate or letters of administration, or inventory, the provisions contained in sections forty, forty-one, forty-two, and forty-three, of the said Act passed in the fifty-fifth year of his majesty king George the Third, relating to probates and letters of administration granted in England, and the like provisions in the Act passed in the fifty-sixth year of the said king, chapter fifty-six, relating to probates and letters of administration granted in Ireland, and the provisions contained in the Act passed in the forty-eighth year of the said king, chapter one hundred and forty-nine, relating to inventories in Scotland, and also all other provisions contained in the said Acts respectively, or in any other Act or Acts relating to probates and letters of administration and inventories respectively, shall apply to the probates and letters of administration to which effect is given by this Act, and to the whole of the personal and moveable estate of the deceased for or in respect of which the same shall, in pursuance of this Act, be deemed to be granted, wheresoever situate in the United Kingdom; and also to the inventories in which the whole of the personal and moveable estate of the deceased, wheresoever situate in the United Kingdom, ought, in pursuance of this Act, to be included, in as full and ample a manner as if all such provisions were herein enacted in reference to such probates, letters of administration, and inventories respectively.

17. [*Affidavit as to domicile to be made on applying for probate or administration.*]—Provided that in any case where, on applying for probate or letters of administration, it shall be required to be stated as aforesaid that the deceased was domiciled in England or in Ireland, the affidavit so as aforesaid required by law shall specify the fact according to the deponent's belief, which shall be sufficient to authorize the same to be so stated in or upon the probate or letters of administration; provided also, that any such statement, and the interlocutor of the commissary finding that the deceased was domiciled in Scotland, shall be evidence, and have effect for the purposes of this Act only.

18. *Acts of sederunt to be passed for following out purposes of this Act.*

19. *Former acts of sederunt repealed if inconsistent with this Act.*

20. [*Interpretation of terms.*]—The word "Commissary" shall include Commissary Depute, and the term "Commissary Clerk" shall include Commissary Clerk Depute.

22 & 23 *Vict. c.* 63.—An ACT to afford Facilities for the more certain Ascertainment of the Law administered in one Part of Her Majesty's Dominions when pleaded in the Courts of another Part thereof.—13th August 1859.

Whereas great improvement in the administration of the law would ensue if facilities were afforded for more certainly ascertaining the law administered in one part of Her Majesty's dominions when pleaded in the courts of another part thereof: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. [*Courts in one part of Her Majesty's dominions may remit a case for the opinion in law of a court in any other part thereof.*]—If in any action depending in any court within Her Majesty's dominions, it shall be the opinion of such court that it is necessary or expedient for the proper disposal of such action to ascertain the law applicable to the facts of the case as administered in any other part of Her Majesty's dominions, on any point on which the law of such other part of Her Majesty's dominions is different from that in which the court is situate, it shall be competent to the court in which such action may depend to direct a case to be prepared setting forth the facts, as these may be ascertained by verdict of a jury or other mode competent, or may be agreed upon by the parties, or settled by such person or persons as may have been appointed by the court for that purpose in the event of the parties not agreeing, and upon such case being approved of by such court or a judge thereof, they shall settle the questions of law arising out of the same on which they desire to have the opinion of another court, and shall pronounce an order remitting the same, together with the case, to the court in such other part of Her Majesty's dominions, being one of the superior courts thereof, whose opinion is desired upon the law administered by them as applicable to the facts set forth in such case, and desiring them to pronounce their opinion on the questions submitted to them in the terms of the Act; and it shall be competent to any of the parties to the action to present a petition to the court whose opinion is to be obtained, praying such last-mentioned court to hear parties or their counsel, and to pronounce their opinion thereon in terms of this Act, or to pronounce their opinion without hearing parties or counsel; and the court to which such petition shall be presented shall, if they think fit, appoint an early day for hearing parties or their counsel on such case, and shall thereafter pronounce their opinion upon the questions of law as administered by them which are submitted to them by the court; and in order to their pronouncing such opinion they shall be entitled to take such further procedure thereupon as to them shall seem proper.

2. [*Opinion to be authenticated and certified copy given.*]—Upon such opinion being pronounced, a copy thereof, certified by an officer of such court, shall be given to each of the parties to the action by whom the same shall be required, and shall be deemed and held to contain a correct record of such opinion.

3. [*Opinion to be applied by the court making the remit.*]—It shall be

competent to any of the parties to the action, after having obtained such certified copy of such opinion, to lodge the same with an officer of the court in which the action may be depending, who may have the official charge thereof, together with a notice of motion, setting forth that the party will, on a certain day named in such notice, move the court to apply the opinion contained in such certified copy thereof to the facts set forth in the case herein-before specified, and the said court shall thereupon apply such opinion to such facts, in the same manner as if the same had been pronounced by such court itself upon a case reserved for opinion of the court, or upon special verdict of a jury; or the said last-mentioned court shall, if it think fit when the said opinion has been obtained before trial, order such opinion to be submitted to the jury with the other facts of the case as evidence or conclusive evidence, as the court may think fit, of the foreign law therein stated, and the said opinion shall be so submitted to the jury.

4. [*Her Majesty in Council or House of Lords on appeal may adopt or reject opinion.*]—In the event of an appeal to Her Majesty in council or to the House of Lords in any such action, it shall be competent to bring under the review of Her Majesty in council or of the House of Lords the opinion pronounced as aforesaid by any court whose judgments are reviewable by Her Majesty in council or by the House of Lords; and Her Majesty in council or that House may respectively adopt or reject such opinion of any court whose judgments are respectively reviewable by them, as the same shall appear to them to be well founded or not in law.

5. [*Interpretation of terms.*]—In the construction of this Act, the word "action" shall include every judicial proceeding instituted in any court, civil, criminal, or ecclesiastical; and the words "superior courts" shall include, in England, the superior courts of law at Westminster, the Lord Chancellor, the Lords Justices, the Master of the Rolls or any Vice-Chancellor, the Judge of the Court of Admiralty, the Judge Ordinary of the Court for Divorce and Matrimonial Causes, and the Judge of the Court of Probate; in Scotland, the High Court of Justiciary, and the Court of Session acting by either of its divisions; in Ireland, the superior courts of law at Dublin, the Master of the Rolls, and the Judge of the Admiralty Court; and in any other part of Her Majesty's dominions, the superior courts of law or equity therein.

DICTIONARY

OF

PARALLEL TERMS AND PHRASES IN THE LAWS OF ENGLAND AND SCOTLAND, WITH INDEX OF MATTERS.

The figures refer to the paragraph, not to the page.
(E) means England, or according to the law of England.
(S) means Scotland, or according to the law of Scotland.
At C. L. means in the Common Law Courts.
In Ch. means in the Court of Chancery.
= means equivalent to, or nearest analogy to.

ABANDONMENT OF AN ACTION (S) *i. e.*, where the pursuer abandons the cause. If before the record is closed, the costs are discretionary, *Caled. R. Co.* v. *Clyne*, 10 S. D., 133; if after closing the record, then he must pay costs, 6 Geo. IV. c. 120, § 10, and he can bring a new action. A minute of the abandonment must be made and ratified by a judge = (E) Discontinuance, *nolle prosequi*, or nonsuit at C. L., according to the stage at which the action has arrived, 1113. The plaintiff can, without any leave, enter the discontinuance or *nolle prosequi*, the court not interfering; but the plaintiff must pay costs, and he may bring a fresh action. If, however, a *nolle prosequi* is entered after judgment, no new action can be brought. In Ch. an order will be made for dismission of a suit for want of prosecution, 1157.

ABATEMENT OF A SUIT OR ACTION (E) *i. e.*, a defect caused by the death of one of the parties; an action is now continued by entering a suggestion of the death on the record = (S) in such circumstances the action is continued by transference.

——— OF LEGACIES (E) *i. e.*, where legacies are bequeathed by a testator, but the debts are too large to admit of the legacies being paid in full, then the legacies must abate in proportion = (S) also frequently used, 699.

——— PLEAS IN (E) (which include pleas of nonjoinder, of misnomer, pleas to the jurisdiction etc.), *i. e.*, defences grounded on some cause, generally temporary, whereby the plaintiff cannot maintain his present action. If the plea is overruled, the judgment is generally *respondeat ouster*; if held good, the plaintiff either enters a *cassetur breve*, or the writ is quashed = (S) dilatory or preliminary pleas or defences. The court pronounces an interlocutor repelling or sustaining the plea, 1073.

ABBREVIATE OF ADJUDICATION (S) *i. e.*, a short abstract of the decree of adjudication, and of the lands adjudged, signed by the extractor, which must be registered to give priority, 1137 = (E) memorandum or minute of judgment at C. L. or decree in Ch., which must be left with the master of the common pleas for registration, and re-registration is required every five years, 1135. An execution of *elegit* is not registered.

ABDUCTION (E) of girls under sixteen, having interest in property, against their will, with intent to marry or defile them, is felony; so abduction of girls, though having property, without their parents' consent, is a misdemeanour = (S) the same; a crime at common law, punished arbitrarily.

ABETTOR (E) = (S) art and part.

ABEYANCE (E) as where a fee is *in nubibus* till some person emerge, in whom it can vest, 148 = (S) *in pendente;* also resembling the *hæreditas jacens* of a person deceased till some one enter as heir. As to destinations or marriage contracts, 928.

ABIDING BY A DEED (S). In an action of reduction, *i. e.*, where a deed or writing is attacked as forged, the party founding on the deed must judicially declare that he abides by it, otherwise decree of certification will be pronounced against it as false. When a party has abidden by a deed, then articles improbatory, with answers approbatory, on both sides respectively, are ordered by the court to be given in = (E) not known.

ABSCONDING OF WITNESS (S). A witness about to abscond may, in civil and criminal cases, be apprehended till he find caution for his appearance = (E) not used. In civil cases a witness who is suspected to be about to leave the country cannot be arrested or made to find bail; he can only be punished after he has actually disobeyed his subpœna, 1091; 976.

——— OF DEBTOR, 1140 = (E) sometimes used. *See* "Bail."

ABSENCE, DECREE IN (S) = (E) at C. L. judgment by default, 1071; in Ch. "decree *pro confessione*," 1155.

——— (S) = (E) non-appearance, 1071.

ABSOLUTE DISPOSITION (S) = (E) conveyance in fee.

——— DISPOSITION, WITH BACKBOND (S) = (E) mortgage, 91.

——— WARRANDICE AGAINST ALL DEADLY (S) = (E) general warranty or covenant for title, 320.

ABSQUE HOC (E) old term used in pleading at C. L., introducing a qualification in a traverse of matter of fact = (S) not known.

ABSTRACT OF TITLE (E) = (S) progress of writs or titles, 323, 366.

ABSTRACTED MULTURES, action for (S) 290. The action prescribes in five years = (E) action for breach of covenant to do suit to landlord's mill. The action prescribes in twenty years.

ABUTTALS (E) in deed or grant of land = (S) boundaries or marches of adjoining lands in a disposition, 361.

ACCEPTILATION IN CONTRACTS (S) = (E) accord and satisfaction, 476.

ACCESSARY in a crime (E). A person may be an accessary after the fact, by receiving, harbouring, and assisting the felon = (S) accessary, also "art and part." There is no accession after the fact to a crime. 1 Hume Cr. L. 282; Alison Princ. 57, 70.

ACCESSION (S) *i. e.*, a mode of acquiring property by natural and artificial means, as by cattle having young, etc. = (E) the same.

ACCESSION, DEED OF, (S) = (E) Composition-deed or deed of composition and inspection.

ACCESSORY in a crime (S) = (E) accessary, and also aider and abettor.

——— ACTIONS (S) *i. e.*, those actions subservient to others as actions of transference, of proving the tenor, and of transumpt, 1058 = (E) no general term. Of this nature are revivor, *scire facias*, suggestion on record, bill for relief, bill for a discovery.

——— OBLIGATIONS (S) *i. e.*, obligations adjected to primary obligations, such as cautionary obligations = (E) not used.

ACCOMPLICE IN CRIME (S) or *socius criminis* = (E) the same, 973; also, one of many equally concerned in a felony, and who is admitted to give evidence against his fellows.

ACCORD AND SATISFACTION in contracts (E) = (S) acceptilation, 474.

ACCOUNT (E) bill for an = (S) action of count and reckoning, 1150.

——— OF EXPENSES (S) = (E) bill of costs, 1222.

ACCOUNTANT (S) A remit is often made by a Lord Ordinary, or the Court, to an accountant to report on the state of the accounts, and to prepare a scheme of division = (E) accountants are seldom made arbiters to whom cases involving disputed accounts, etc., are referred, barristers being chosen. In Ch. the chief clerk takes the accounts.

——— GENERAL, in Ch. (E) = (S) The accountant of court in the Court of Session.

ACCRESCE (S) as to a *pro indiviso* right = (E) to survive as to joint tenancy, 161.

ACCRETION (S) *i. e.*, where a right, originally defective or imperfect, is completed by some posterior act on the part of him from whom the right is derived. Thus, where one not infeft conveys land, giving a precept of infeftment which is acted on, the subsequent infeftment of the vendor validates the prior infeftment of the vendee = (E) not used; the supervening of an after-acquired right; relation back of title.

ACCUMULATIVE LEGACIES (E) = (S) Cumulative legacies.

ACKNOWLEDGMENT OF A DEBT (S) = (E) memorandum or receipt, as the case may be.

——— OF DEBT (E) to take case out of Statute of Limitations = (S) the same, 496.

——— OF DEED BY MARRIED WOMEN (E) = (S) ratification or judicial ratification, 887.

ACQUITTANCE (E) = (S) discharge.

ACT AND COMMISSION (S) = (E) A commission to examine witnesses abroad; an order for the examination of witnesses within the jurisdiction, 1094.

——— AND WARRANT (S) of confirmation of a trustee in a sequestration = (E) certificate of appointment of the assignees.

——— OF GRACE (S) *i. e.*, a statute by which the incarcerating creditor is bound to aliment his debtor in prison, if such debtor has no means of support; and failing such aliment being provided, the debtor may be liberated = (E) no similar provision, *see* "Execution," "Insolvent." A debtor imprisoned on a *ca. sa.* is supported out of the county rates, and not at the expense of the detaining creditor, 1229.

——— OF SEDERUNT (S) = (E) at C. L., a rule of Court; in Ch. an order of Court.

——— OF WARDING (S) *i. e.*, a warrant to imprison for debt, issued by burgh magistrates—an ancient right = (E) commitment on a conviction, which must be authorized by some statute.

ACTIO REDHIBITORIA, or action of repetition (S) = (E) action for money had and received, 454.

ACTION (S) = (E) action at C. L.; a suit in Ch. and in Eccl. and Adm. To raise an action (S) is in (E) to bring an action at law; to commence a suit, or file a bill, or claim, or petition, in Ch.; to promote a suit in Eccl. Court. Outline of an action at law, 1068; writ of summons, 1068; service, 1069; entering appearance, 1070; non-appearance and judgment by default, 1071; the declaration, 1072; the plea and general issue, 1073; replication, rejoinder, etc., 1074; time to plead, 1075; month's notice to plead, 1076; special pleading, 1077; demurrer, 1078; issue of fact and trial, 1079; the venue, *ib.*; judge at chambers, 1080; new matter, 1081; order to examine parties, 1082; to inspect, 1083; deeds relied on, etc., 1084; affidavits, 1085; reference to party's oath, 1086; order of counsel's address to jury, 1087; right to begin at trial, 1088; issue controlled by pleadings, 1089; witnesses at trial, 1090; evidence generally, 1097; discontinuance, etc., 1113; signing judgment, 1115; attachment of debts, 1117; costs, 1119; execution, 1123; execution against the person, 1126; against the personal estate, 1131; against the real estate, 1134; bail of absconding debtors, 1140.

ACTOR OF SUIT (S). Actor or act. is an abbreviation for pursuer's counsel and attorney; alter or alt. is the same for defender's do. = (E) (seldom used) plaintiff.

ACTS OF BANKRUPTCY (E) = (S) notour bankruptcy, 1178.

ACTUS (S) *i. e.*, road for passengers riding and driving = (E) (seldom used); highway, if the public have a right to it; easement called a right of way, if only for owner or occupier of a particular close, 287.

ADDITION (E) *i. e.*, that part of the designation consisting of the trade or calling of a person, as "butcher," "gentleman," etc. = (S) included in "designation." It sometimes, but not correctly, also includes the place of abode.

ADHERE (S) to adhere to an interlocutor = (E) to affirm the judgment, or give judgment for defendant in error at C. L.; in Ch. to dismiss the appeal.

ADHERENCE, ACTION OF (S) = (E) petition for restitution of conjugal rights.

ADJOURNMENT of proceedings before magistrates (S) = (E) same.

——— of trial (S) = (E) postponement of trial.

ADJUDICATION (S) = (E) of *elegit*, 131; execution, 1137.

——— *contra hæreditatem jacentem* (S) *i. e.*, where a debtor infeft in heritable estate dies, and the heir-apparent renounces the succession, the creditor obtains a decree *cognitionis causa*, which ascertains the amount of the debt, and then the creditor proceeds against the estate by adjudication, 779 = (E) not known, for the real estate of a deceased person vests at once in his heir, without any proceedings of law; action against the heir.

——— IN IMPLEMENT (S) = (E) the vendee's remedy is specific performance of the contract of sale of land, 318.

——— IN SECURITY (S) *i. e.*, where a debt is contingent, future, or uncertain in amount, and the debtor is *vergens ad inopiam* or other creditors are adjudging, the creditor can raise an action of adjudication in security which results in giving him a hold on the debtor's heritable estate

= (E) not competent; no remedy till debt is due, 1137. But if an executor is insolvent, he may be ordered to give security for payment of legacies.

ADJUDICATION of bankruptcy (E) (formerly fiat of bankruptcy) = (S) award of sequestration.

——— on *debitum fundi* (S) *i. e.*, where there is a real burden on heritage the creditor can, after executing letters of poinding the ground, proceed against the estate by adjudication = (E) suit of foreclosure is the only remedy, when the court may order a sale, 263, 272.

——— on trust-bond or disposition (S) *i. e.*, a mode of making up titles where an heir is apprehensive he may otherwise incur a passive representation of his ancestor = (E) not known and not needed.

ADJUDGER (S) = (E) tenant by *elegit*, 1137.

ADMINICLE (S) *i. e.*, article of proof, being ground of action to prove the tenor of lost deed or writing = (E) not used except in the Probate Court.

ADMINISTRATOR (E) in case of intestacy = (S) executor-dative; who entitled to be, 732; creditor appointed, 733; next of kin, under Statute of Distributions, 733, etc.

——— *cum testamento annexo* (E) *i. e.*, appointed where an executor has failed or died = (S) executor-dative, 682.

——— *de bonis non* (E) *i. e.*, appointed where all the goods have not been fully administered by the preceding executor or administrator = (S) executor-dative *quoad non executa*, 682.

——— IN LAW (S) *i. e.*, the name given to a father who is entitled as such to be the tutor of his pupil children, and curator of his children when minors = (E) guardian, 819.

ADMIRALTY, COURT OF (E) now open to barristers and attorneys by Stat. 20 & 21 V. = (S) Court of Session is now chiefly the Court of Admiralty, by 1 W. IV. c. 69.

ADMISSION TO A CHURCH (S) of a presentee of the patron = (E) admission of a clerk to the cure or benefice of a church.

ADMIT, NOTICE TO (E) *i. e.*, a notice by one party to the other, before trial, to admit certain documents, which may be inspected; failing which, the expense of proving the documents will fall on the party not admitting, whatever be the result = (S) not known, for each party must produce his deeds, etc., in process, or lodge them with clerk of court before trial, 1084.

ADMITTANCE of copyholder, or his heir or purchaser (E) = (S) entry of vassal or his heir or singular successor with the superior, 185, 186.

ADVANCE to a child (S) imputable to *legitim* = (E) advancement, 742.

ADVANCES, future, on real estate in (E), 97; in (S) *ib. n.*

ADVANCEMENT (E) *i. e.*, advance of money, etc., made to a child, which counts as part of his distributive share, on father's death = (S) same, generally called advance, 742.

ADVENTURE, JOINT (E) *i. e.*, a temporary or partial partnership = (S) the same; partnership.

ADVOCATE (S) *i. e.*, a counsel practising at the bar. In Aberdeen the procurators are called advocates, but in no other locality = (E) barrister-at-law. Until lately advocate was the proper designation of those who practised in the Probate and Admiralty Courts, and still is the name given to those who practise in what remains of the Ecclesiastical Courts.

ADVOCATE, LORD, (S) = (E) Attorney-General; but the latter, though a Crown prosecutor, is not as in (S) a public prosecutor, there being no such office in (E), 944, 1210.

——— precedence of, in House of Lords, 1045.

ADVOCATION, NOTE OF (formerly Letters of), (S) *i.e.*, a mode of removing a cause from an inferior to the Supreme Court. The cause may be advocated either before or after final judgment. Advocation of interlocutory judgments is now regulated by 16 & 17 Vic., c. 80; and these must originate in the Bill Chamber. In all cases originating in the Sheriff Court, where the claim exceeds £40, as soon as an interlocutor allowing a proof has been pronounced, either party may advocate the cause *de plano* so as to have a jury trial in the Court of Session, 1168, 1169 = (E) at C. L. if before trial "*Certiorari*," which applies to criminal as well as civil cases; if final judgment has been pronounced, "a writ of error" to the Queen's Bench and security is required to be found for the plaintiff in error. This also extends to criminal cases. An appeal also lies after judgment from a county court to a superior court of law. In petty courts, not courts of record, a writ of false judgment lies for the same purpose.

——— OF BRIEVES (S) = (E) no such proceeding, as the maxim *mortuus sasit vivum* obtains.

ADVOWSON (E) = (S) right of patronage or of presentation to a church or benefice, 997.

AFFIDAVIT (E). In (E) in incidental proceedings in an action and in motions, facts must in general be stated on oath by affidavit to ground the application = (S) the same. But affidavits are seldom used, except in applications for postponing trials, etc. In (S) similar facts are stated orally by counsel without affidavit, or in a minute given into Court, and put on the record, 1085.

——— OF DEBT (E) by a creditor who proves in bankruptcy = (S) oath of verity in a sequestration.

——— OF INCREASE (E) *i.e.*, an affidavit at C. L. so called, because it verifies the bill of costs before the master on taxation, the costs above a nominal amount being called costs of increase = (S) not used.

AFFRAY (E) *i.e.*, a public fight or skirmish between two or more persons where strokes are given or weapons drawn = (S) not used technically.

AGENT OR LAW-AGENT (S) *i.e.*, subdivided into writers to the signet, solicitors before the supreme court, solicitors at law, procurators in sheriff courts = (E) attorney at C. L., solicitor in Ch.; formerly proctor in Probate and Divorce, etc., Courts, 1219. When an attorney or solicitor in London acts for one in the country, he is said to be agent of the other, and the business is called "agency business." Agent is not, in any other sense, a term applied generally to an attorney, solicitor, or proctor in (E)., 1219, *et seq.*

——— AND CLIENT, LAW OF, (S) = (E) law of attorney and client, 1219, *et seq.*

AGISTMENT (E) *i.e.*, putting milch cows in a field to graze, the agister paying a sum or rent for agistment = (S) grazing cows, for which grass mail is paid, 411, 599.

AGNATE (S) = (E) seldom used; a relation through the father's side.

AGREEMENT (E) = (S) the same, 431.

ALIEN, 803.

ALIENATION of freeholds, 25; alienation in mortmain, 26; to corporations, 27; by tenant in tail, 32-38.

ALIMENT (S) = (E) necessaries, 845, 850; in Ch. and deeds of settlement, maintenance, 708, 893.

ALIMENT OF FIAR by liferenter, 72; of child by parent, 845; of parent by child, 845; of husband by wife, 916; of wife by husband, 891; of brothers and sisters, 848.

——— WIFE'S (S) = (E) alimony in Divorce Court.

ALIMENTARY DEBT (S) = (E) debt incurred for necessaries or maintenance, 931.

——— FUND (S) *i. e.*, a fund set apart by the destination of the giver for an aliment to the receiver; and it is, if not unreasonable for the rank of the receiver, not arrestable by creditors, 931 = (E) fund appropriated to maintenance, as when settled on wife to her separate use, with proviso against anticipation or alienation.

ALLENARLY (S). This word has a technical sense, and is used to restrict conveyances to a father and his children, so as to prevent him becoming fiar or absolute owner. Thus in a conveyance to "A for his liferent use allenarly and his children *nascituri* in fee;" but for the word "allenarly" he would take the fee, 59, 928 = (E) "only," not technical.

——— use of word in destination of liferent, 59; in marriage contracts, 928.

ALLOCATUR (E) the certificate of the master of a common law court, allowing and settling the costs = (S) report of the auditor.

ALLODIAL (S) *i. e.*, lands which have no feudal superior or lord = (E) freeholds, which, in point of theory, are held of the Crown by the freeholder, as a tenant *in capite;* but practically they are allodial, the form or holding being illusory.

ALTERNATIVE (S) = (E). In alternative rights or remedies, the party is said to "elect, or make his election."

ALTIUS NON TOLLENDI (S) *i. e.*, a servitude not to build higher = (E) an easement not to darken lights, 314.

AMENDMENT OF THE LIBEL (S) = (E) amendment of the declaration or indictment at C. L., of the bill in Ch., etc., as the case may be.

AMICUS CURIÆ (E) *i. e.*, counsel or stranger volunteering advice or information to the court on matter of law = (S) not used.

AMOTIO in theft (S) = (E) asportavit.

ANCESTOR (S) = (E) the last purchaser, from whom the descent is generally traced.

ANCIENT DEMESNE (E) *i. e.*, a tenure in copyhold, 174 = (S) not known, but nearly all lands are held on a similar, called the feudal tenure.

ANN OR ANNAT (S) *i. e.*, half-year's stipend due to deceased clergyman's widow and next of kin, by stat. 1672, c. 3 = (E) no term.

ANNUALRENT, INFEFTMENT OF (S) = (E) annuity charged on lands, or rentcharge, 91, 265.

ANNUALRENT RIGHT (S) *i. e.*, where a person infeft grants away his land, reserving a yearly sum = (E) the converse is an annuity charged on land, *i. e.*, where the owner keeps the land, but grants the annuity to a third person, 265.

ANNUALRENTER (S) = (E) grantee of rentcharge, 265.

ANNUITY (E) = (S) the same, or a liferent sum, or an annualrent, 258.

ANNUITY TAX (S) *i. e.*, a local tax in Edinburgh and Montrose for the support of certain clergy of the Established Church = (E) not known in any locality.

ANNULLING adjudication of bankruptcy (E) = (S) recal of sequestration.

ANNUS DELIBERANDI (S) *i. e.*, a year given to the heir-at-law to elect whether he will take up his ancestor's succession, and enter himself as heir = (E) not known, and not necessary, because the real estate vests in the heir on the death of his ancestor whether he will or no, unless it is devised away by will, 779.

ANSWER IN CHANCERY (E) *i. e.*, a defence on the merits as distinguished from plea = (S) defences, also sometimes defences and answers.

——— PROOF BEFORE (S) = (E) where the Court orders the issues in fact to be tried before the issue in law, or demurrer, is disposed of, 1078.

ANTENUPTIAL CONTRACT (S) = (E) antenuptial settlement or agreement; also articles of marriage, 922.

APOCHA TRIUM ANNORUM (S) *i. e.*, a presumption of payment of rent, founded on possession by the tenant of three receipts running = (E) not used, but in the same circumstance a jury or judge would hold this a strong circumstance from which to presume payment, 463.

APPARENT HEIR (S) *i. e.*, the heir-at-law who, after his ancestor's death, is entitled to succeed if he choose, but has not yet made up his title = (E) the same term means the person, in his ancestor's lifetime, who will certainly be heir if he survive his ancestor, 753. It is, however, also used popularly in the English sense; his debts and creditors, 782.

APPEAL from County Court (E) = (S) advocation from Sheriff Court.

——— from one Court in Ch. to another, corresponding to suggestion of error (formerly writ of error), from one common law court to the next highest = (S) reclaiming note from Lord Ordinary to Inner House; if from Inner House to House of Lords, then called an appeal.

——— to House of Lords, 1043.

APPOINTMENT (E) power of = (S) faculty, 291; power of appointment among children is in (S) faculty of distribution.

APPORTIONMENT (E) as, *e. g.*, severing a chief ground rent among tenants = (S) like dividing a *cumulo* feu-duty.

——— AND DISTRIBUTION, power of (S) = power of appointment (E).

——— OF RENT (E) *i. e.*, in leasehold estates = (S) like regulation of cumulo feu-duty, or apportionment of ground annual; at death of tenant for life, 69.

APPREHENDING A DEBTOR OR CRIMINAL (S) = (E) in civil proceedings arresting or taking the person of the debtor in execution by *ca. sa.*, 1126, 1140. In criminal cases, same term.

APPRIZING (S) *i. e.*, old name for adjudication of heritage = (E) *elegit.*

APPROBATE AND REPROBATE (S) = (E) to elect, doctrine of election; as to deeds, 710.

APPROVER (E) = (S) Queen's witness.

APPURTENANCES (E) = (S) pertinents and pendicles.

APUD ACTA (S) *i. e.*, notices given to witnesses and parties at one diet to attend at an adjourned diet = (E) a notice to attend, generally verbal, or by letter from the attorney.

AQUEDUCTUS (S) *i. e.*, servitude to draw water through another's land = (E) an easement to do the same, 311.

AQUEHAUSTUS (S) *i. e.*, servitude to water cattle in another's land = (E) easement to do the same, 311.

ARBITER (S) = (E) arbitrator, 1198; agreement to refer, 1198; compulsory arbitration, 1199; writing, 1200; award, 1201; enforcing award, 1202.

ARBITRARY PUNISHMENT (S) *i. e.*, where the judge can punish at discretion, which must be either by fine, corporal punishment or imprisonment = (E) punishment according to discretion of judge.

ARBITRATION, agreement to refer, 1198; award, 1201.

ARBITRATOR (E) = (S) arbiter, 1198.

ARCHES COURT (E) *i. e.*, an ecclesiastical court of discipline which entertains appeals from all inferior ecclesiastical courts, and an appeal from which lies to the Privy Council, 995 = (S) presbytery, synod, General Assembly.

ARGUMENT (E) = (S) debate.

ARLES (S) = (E) earnest.

ARRAIGN, to (E) *i. e.*, to bring the prisoner to the bar previous to trial to state the charge, and to ask him if he is guilty or not guilty = (S) to hear the libel read; in cases of treason the term arraign is also used, 967.

ARRAY (E) *i. e.*, where the jurors have been summoned by a sheriff, who is interested or suspected of partiality, and a party may challenge the array = (S) seldom used.

ARREST, to (E) *i. e.*, in civil actions to take into custody of the sheriff = (S) to imprison; also to apprehend.

——— OF JUDGMENT (E) *i. e.*, a summary application to the court to stay proceedings on account of some defect in the record = (S) the same in criminal courts; the term arrest of judgment is used in civil cases.

ARREST (E) = (S) apprehension, also imprisonment.

ARRESTEE (S) = (E) garnishee.

ARRESTMENT (S) *i. e.*, a diligence whereby a debtor having goods or money of his creditor, is prevented from delivering or paying the same to such creditor, until another debt due by such creditor to the arrester is paid or secured. The arrestment can be used before as well as after decree against such creditor. The party in whose hands the arrestment is laid is called the *arrestee* (garnishee E), and the arrester's debtor is called the common debtor (no term, defendant E) = (E) foreign attachment, which prevails only in London, and one or two other places; if after judgment, it prevails in courts of C. L. under the name of attachment.

——— OF DEBTS generally, 480, 1119.

——— IN SECURITY (S) *i. e.*, where a creditor has a liquid ground of debt against his debtor, the time of payment of which has not arrived, as a bill or bond; then if D is *vergens ad inopiam*, C may get letters of arrestment to secure the debt till caution is found = (E) not known, and no remedy, 479.

——— OF GOODS (S) = (E) attachment of goods which is not allowed before judgment, 480, 1120. There is a similar process for attaching debts and goods, by special local custom in the city of London, called "foreign attachment." The arrestee is called the *garnishee;* loosing the arrestment (S) is (E) dissolving the attachment; of servants' wages, 837.

——— *jurisdictionis fundandæ causa* (S) *i. e*, a mode of arresting goods or

debts due to a foreigner, whereby, though he lives abroad, he is made subject to the jurisdiction of the courts in Scotland = (E) foreign attachment; no such ground of acquiring jurisdiction is competent, 1060, 1247.

ARSON (E) = (S) wilful fire-raising.

ART AND PART (S) = (E) accessary before the fact; also principal in the second degree.

ARTICLES OF THE PEACE (E) *i. e.*, a complaint before justices of the peace or the Court of Queen's Bench, that a party stands in fear of his life from the threats of another, whereon the latter is ordered to find sureties to keep the peace = (S) letters of lawburrows, and bond of caution thereon.

ARTICLES OF ROUP (S) = (E) conditions of sale by auction.

——— OF AGREEMENT (E) = (S) minute of agreement or missive.

——— OF SET (S) = (E) agreement for a lease.

——— OF MARRIAGE (E) = (S) antenuptial contract.

——— IMPROBATORY (S) = (E) part of a suit in Ch. (the charge in the bill) to set aside a deed.

——— APPROBATORY (S) = (E) answers to charge in a bill in Ch.

ASPORTAVIT (E) in larceny = (S) amotio.

ASSEDATION (S) old term used in leases, and sometimes feu rights = (E) demise or lease.

ASSEMBLY, UNLAWFUL (E) *i. e.*, a meeting of three or more persons to do an unlawful act = (S) mobbing.

——— GENERAL (S) *i. e.*, the supreme Ecclesiastical Court for matters of clergy discipline, composed of clergy as well as laymen, representatives from all the inferior judicatories = (E) as to church discipline, Court of Arches, and Judicial Committee of the Privy Council, 995; as to making canons and general matters, convocation, 991.

ASSENT (E) as of an executor to a legacy = (S) consent.

ASSETS (E) *i. e.*, all real and personal estate which can be applied in payment of debts = (S) also much used; in case of death of debtor, 691; legal and equitable, *ibid*, 785.

ASSIGNATION (S) = (E) assignment; of bond and disposition in security, 95, 96; of debts, 476.

ASSIGNEE (E) = (S) the same, also cessioner or cessionary.

——— OFFICIAL (E) *i. e.*, an officer of court in whom the bankrupt's estate vests at once on bankruptcy = (S) *interim* factor, 1211.

ASSIGNEES OF BANKRUPT, generally two or more (E) = (S) trustee in a sequestration, generally only one.

ASSIGNMENT (E) = (S) assignation; also assignation and conveyance.

——— OF MORTGAGE 95; of lease, 388; of debts, 476.

——— OF DOWER (E) *i. e.*, the setting out of lands by the heir, terre-tenant, or sheriff, to the widow for her dower = (S) kenning to the terce, 911.

ASSIZE (S) *i. e.*, the jury in criminal cases tried in the Court of Justiciary, consisting of fifteen men, 960 = (E) not used; jury.

ASSIZES, JUSTICES HOLDING, (E) *i. e.*, judges who try civil as well as criminal causes on circuit = (S) Court of Justiciary on circuit, which tries only criminal causes, 940; jury trials in civil causes generally take place in Edinburgh.

ASSOCIATE (E) *i. e.*, master or clerk at *nisi prius* = (S) clerk of jury causes, clerk of session.

ASSOCIATE in joint ownership (S) = (E) companion in joint tenancy, and tenancy in common.

ASSOILZIE (S) = (E) at C. L., give judgment for defendant; in Ch., to dismiss the bill or claim on merits; in Crim. L., to find verdict of not guilty.

ASSUMPSIT, ACTION OF (E) = (S) (no special term) action of damages for breach of contract, 1058.

ASSUMPTION, DEED OF (S) = (E) deed of appointment of new trustees under a power in the settlement.

ASSURANCE (E) *i. e.*, a title-deed conveying interest in real property at common law = (S) title-deed or evidents; assurance means also a declaration taken by justices of the peace under 6 Geo. II. c. 53.

ASSYTHMENT (S) *i.e.*, damages awarded to relatives of murdered person, from the guilty party who has not been convicted and punished = (E) not known and not competent. But if a spouse, parent, or child is killed through the negligence of A., certain relations can bring an action of damages; yet nothing is awarded by way of *solatium*, apart from direct pecuniary loss, 511, 941.

ASTRICTION (S) = (E) covenant to do suit to a will. In (S) it is a servitude, 290.

ATTACHMENT (E) *i. e.*, imprisonment for contempt of court = (S) caption or imprisonment.

——— OF DEBT (E) which, however, unless in the city of London, where it is called foreign attachment, is not competent until after judgment = (S) arrestment, which may be either before or after decree; generally, 480, 1120.

ATTAINDER of tenant in fee-simple, 3; of tenant in tail, 45; of person in counting descent, 764.

ATTENDANT TERM (E) a device of conveyancing, for the purpose of securing provisions to children, etc. = (S) not known.

ATTESTATION CLAUSE (E) = (S) testing clause, which requires to be executed with great strictness, 344; in wills, 666.

ATTESTOR OF CAUTIONER (S) *i.e.*, a third party vouching for solvency of cautioner = (E) in justifying bail, the bail themselves prove their sufficiency, but no third person vouches for their veracity, on pain of liability.

ATTORNEY (E) = (S) law-agent, sub-divided into Writers to the Signet, or W.S.; Solicitors before the Supreme Court, *i. e.*, S.S.C.; Solicitors-at-Law, S.L.; and Writers or Procurators, 1219, *et seq.*

ATTORNEY-GENERAL (E) = (S) Lord Advocate, who is also the public prosecutor, 944; precedence in House of Lords, 1045.

——— LETTER, OR POWER OF (E) = (S) mandate.

ATTORNMENT (E). Where a tenant sells or assigns his lease, the assignee or new tenant may attorn to the landlord, *i.e.*, acknowledge his title. Also the tenant may attorn to the purchaser of the landlord's reversion. Attornment is not necessary, but if it has taken place, it estops the tenant = (S) not used; to mortgagee, 108.

AUCTION (E) = (S) the same; also roup; sale of goods by, 537; sale of land by, 338.

AUDIT (S) = (E) taxation, 1121.

AUDITA QUERELA (E) a writ seldom used, by which, after judgment, matter

may be brought before the court to show that the execution ought not to issue = (S) minute setting out *res noviter veniens ad notitiam.*

AUDITOR OF COURT OF SESSION (S) = (E) at C. L., the duty of taxing costs is performed by a master of the court, 1120; in Ch. an officer called the taxing master performs it.

AUGMENTATION, process of (S) *i. e.*, a process in the Teind Court raised by a minister of the Established Church, against the titular and heritors, for the purpose of obtaining an increase of his stipend = (E) not known, 1019.

AUTER DROIT (E) *i.e.*, where one sues in right of another; thus an executor sues *en auter droit* = (S) no term. *See* "Author."

AUTHOR (S) = (E) no general term; the person from whom one derives title otherwise than by death, as the settlor, the grantor, vendor, etc.

AUTREFOIS ACQUIT (E) *i. e.*, a plea in criminal cases to the effect that the prisoner was formerly tried and acquitted = (S) plea of *res judicata.*

AUTREFOIS CONVICT (E) plea of a prisoner that he has been already tried, and was convicted = (S) plea of *res judicata.*

AUTRE VIE, estate *pur* (E) *i. e.*, an estate held during the life of another person = (S) no term; included in liferent.

AVERMENT (S) = (E) allegation in a pleading at C. L.; also the old technical name for an offer to verify any allegation in a pleading.

AVIZANDUM (S) *i. e.*, the taking of a cause by a court or judge home to consider it more fully, for which purpose a formal interlocutor used to be written out, and the language is still used = (E) time to consider, shown in the reports by the words "cur. adv. vult," *i. e.*, *curia advisari vult*, meaning that the court did not deliver judgment immediately after argument, but took time to consider.

AVOIDANCE (E) of a benefice, as by death, resignation, etc. = (S) vacancy.

AVOWRY (E) *i. e.*, the name of a pleading in the action of replevin, whereby the defendant justifies taking goods in his own right = (S) no term.

AWARD (E) = (S) decreet-arbitral, 1201.

——— OF SEQUESTRATION (S) = (E) adjudication of bankruptcy.

AWAYGOING CROP (E) = (S) waygoing crop.

BACK-BOND (S) *i. e.*, a bond given by one who is *ex facie* absolute owner so as to reduce his right to that of a trust, or holder of a bond and disposition in security, 91 = (E) declaration of trust; also defeasance; also condition of a bond as the case may be. A mortgage implies an obligation to reconvey.

BACKSIDE (E) old name used in conveyancing for a yard at the back of the house, etc., conveyed, now disused.

BAIL (E) = (S) same in criminal cases. Cautioner in civil cases.

BAILABLE PROCESS (E) *i. e.*, those actions in which a party can be arrested at C. L. on *mesne* process or before judgment = (S) no term.

BAIL-BOND (E) *i. e.*, a bond given to the sheriff to discharge a party arrested = (S) bond of presentation.

BAILEE (E) = (S) the conductor or lessee, 602.

——— GRATUITOUS (E) = (S) *negotiorum gestor.*

BAILIE in burgh (S) = (E) alderman.

BAILIFF (E) *i. e.*, an officer appointed by the sheriff to execute writs of exe-

cution, often called a bound bailiff or bumbailiff, 1124 = (S) messenger-at-arms; also sheriff's officer in local courts.

BAILIFF (E) *i. e.*, any person authorized by a landlord to distrain goods of his tenant = (S) not known, the officer of court performing such duty, 415.

BAILIWICK (E) *i. e.*, the province or district over which a sheriff has ministerial duties = (S) not used.

BAILMENT (E) *i. e.*, entrusting another with goods for particular purpose, with or without hire; the party entrusting is called the *bailor* and the other the *bailee* = (S) no general term, but special terms as deposit, commodate, etc., hiring, etc.

——— GRATUITOUS, 602; deposit, 604; hiring, 606.

BAILOR (E) = (S) the locator or lessor, 602.

BAIL-PIECE (E) *i. e.*, a piece of parchment containing the means of special bail, 1143 = (S) not known.

BAIRNS' PART OF GEAR, OR LEGITIM (S) = (E) not known, but in city of London there was a similar right called orphanage or portion natural, now abolished, 674.

BANC or Bank, or Banco, court sitting in (E) *i. e.*, where a common law court sits during term disposing of motions and rules = (S) not used; sittings of court, 1056.

BANK-CREDITS (S) *i. e.*, where a customer of a bank, on giving proper security for a given amount, is allowed to overdraw his account up to such amount. The customer gives either heritable security, or by bond of caution, called a bond for a cash credit, 97, 600.

——— NOTES, in (E) and in (S) how far legal tender, 469.

BANKRUPT (E) *i. e.*, a trader, strictly so called, in a state of insolvency = (S) the same; also a person sequestrated, 1174.

BANKRUPTCY as distinguished from insolvency, 1174; courts of bankruptcy and officers, 1175; jurisdiction, 1176; dead bankrupt, 1177; acts of bankruptcy, 1178; goods in the order and disposition of bankrupt, 1179; the certificate, 1180.

BANNS, PROCLAMATION OF (S) = (E) publication of banns, 862.

BAR, members of, in (E) 1209.

——— TRIAL AT (E) *i. e.*, where a trial by jury takes place before the court in banc, which is allowed in very few cases = (S) not known in civil cases, but trials in criminal cases generally take place before two or three judges of the Court of Justiciary, 940.

——— PLEA IN (E) = (S) the same; also peremptory defence, 1073.

——— PERSONAL, or exception (S) = (E) estoppel.

BARATRY (S) *i. e.*, the crime of a judge who accepts a bribe = (E) not used.

BARGAIN AND SALE, DEED OF (E) = (S) disposition, 360.

BARON AND FEME (E) old name for husband and wife = (S) not used.

——— OF EXCHEQUER (E) *i. e.*, the name of a judge of the Court of Exchequer = (S) also formerly used, but the Court of Exchequer is now merged in the Court of Session by 19 & 20 Vict. c. 56.

BARONY (S) *i. e.*, the erection of separate lands into one holding by the Crown = (E) no term as showing tenure, 173. *See* "Copyhold."

BARRING ESTATE TAIL (E) = (S) disentailing the estate; how, 33-43.

BARRISTER-AT-LAW (E) = (S) advocate, 1209.

BASE RIGHTS (S) = (E) no term, because there is no subinfeudation, 18.

BASE FEE (E) *i. e.*, the estate of a tenant in tail, who has not barred the estate tail = (S) not known, 43.

—— FEE (S) *i. e.*, the fee to which the feudal title is not made up, but which is held only *a me* = (E) not known in freeholds; in copyholds, the right of a purchaser, after surrender, before admittance.

BASTARD EIGNE (E) *i. e.*, an elder son born before marriage, who, though a bastard, was yet allowed, in one case, to remain in possession, if the lord had admitted him. This right now practically unknown.

BASTARDS, ALIMENT OF (S) = (E) maintenance of bastards, 849.

BASTARDY, DECLARATOR OF (S) *i. e.*, an action raised to declare the defender a bastard = (E) no such suit, but there is a petition to Divorce Court to declare legitimacy, which may be opposed, 842.

——— ground of escheat of freeholds, 3; custody of child, 849.

BATHING IN SEA, right of, 2.

BATTERY (E) = (S) assault.

BAWDY-HOUSE (E). It is a misdemeanour to keep a bawdy-house, and punishable by fine or imprisonment = (S) included in disorderly house. There is no statute on the subject, but the keeping of such a house is said to be punishable at common law.

BEER-HOUSES (E) *i. e.*, houses having a beer license, as distinguished from ale-houses or inns = (S) public houses are not subdivided in the same manner, but a spirit license may be had by grocers, etc., 1038.

BEFORE ANSWER (S) *i. e.*, where both facts and law are denied, the court sometimes orders the facts to be proved first, reserving the question of law = (E) so, where there are issues of fact and of law, the court may order trial of the issue of fact, *i. e.*, jury trial first, before giving judgment on the demurrer, 1078.

BEGIN, RIGHT TO (E) *i. e.*, a question raised at the beginning of a jury trial, as to which party ought to begin = (S) it is settled before trial by the court making one party pursuer of the issue, 1088.

BEHAVIOUR AS HEIR, or *gestio pro hærede* (S) *i. e.*, acting as heir-at-law, which subjects such person to liability for debts, 781 = (E) no term, because the estate vests in the right heir without his consent, and implies no liability beyond assets.

BENCHERS (E) *i. e.*, seniors in the Inns of Court, entrusted with their government and direction = (S) not known, there being no Inn of Court, but the Dean of the Faculty of Advocates is the chairman, 1210.

BENEFICIARY (S) = (E) *cestui que trust.*

BENEFICIUM CEDENDARUM ACTIONUM (S) = (E) right of a co-surety to sue for contribution, 626.

——— COMPETENTIÆ (S) *i. e.*, where an obligant was sued in a gratuitous obligation, it was a good defence in part that he must retain a competence for his own living = (E) not known as a defence, but a few necessary articles of clothing, etc., are protected from execution under a fi. fa., 1131.

——— DIVISIONIS (S) *i. e.*, an implied right of a cautioner to be sued only for his share *pro rata* = (E) not known; but after surety pays the whole, he may sue his co-sureties for contribution, 626.

——— INVENTARII (S) *i. e.*, privilege of the heir to restrict his liability, by giving in an inventory. This was a privilege which it required a statute to confer. Now, special and general services imply only a

limited liability = (E) not required, because it is implied at common law, 695, 782.

BENEFICIUM ORDINIS (S) *i. e.*, the right of a cautioner to have his principal first discussed or sued, now abolished by 19 & 20 Vict., c. 60 = (E) no term, for a surety cannot insist on the creditor suing the principal first, without an express contract to that effect, 626.

BILL CHAMBER (S) *i. e.*, a department of Court of Session, in which petitions for interdict, suspensions, etc., are entertained = (E) a Vice-Chancellor in Ch., and a judge at chambers at C. L. do like duties.

BILL OF ADVOCATION (S) now note of advocation = (E) certiorari. *See* "Advocation."

——— AND SUSPENSION (S) in criminal case = (E) arrest of judgment; also writ of error in some cases.

BILL OF COSTS (E) = (S) account of expenses.

——— OF EXCHANGE—parties to bills, 546; inland bills, 547; signature, 548; proof of date, 549; proof of no consideration, 550; stranger accepting, 554; duress, 556; protest, 557; death of drawer of cheque, 559; transfer, 560; effect of presentment, 561; day of payment a holiday, 562; receipt on bill, 563; discharge, 564; interest, 565; loss bill, 566; register of protested bills, 567; action on bills, 568; limitation of action on bill, 569; no remedy after six years, 570; disabilities, 571; overdue bill, 573.

——— OF EXCEPTIONS (S) = (E) the same, but now they are seldom resorted to, as nearly the same benefit is attained by motion for new trial, etc.

——— OF HEALTH (S) *i. e.*, of a sick prisoner = (E) application of a person in custody to be discharged for ill health, 1129.

——— OF SALE (E) which must be registered to be good against creditors = (S) assignation of moveables *retenta possessione*, 540.

BILLS IN BILL CHAMBER, etc. (S) = (E) a bill in Chancery is in form a petition; at C. L. not used, the business being done by way of motions.

BLAZON (S) *i. e.*, the badge of a messenger-at-arms = (E) not known; sheriff officers wear no badge, but rather a disguise, 1123.

BLENCH DUTY (S) a duty generally nominal, and payable *si petatur tantum*, and must, if of yearly growth, be demanded within a year, otherwise not actionable = (E) a trifling service like petit serjeanty.

——— HOLDING (S) = (E) petit serjeanty, 15.

BONA FIDES (S) *i.e.*, a doctrine whereby a person in possession on a title, which is bad, but which he believes to be good, if *bona fide* consuming the rents and profits, is not liable to account for the same until after decree, 296 = (E) not known.

——— NOTABILIA (E) *i. e.*, chattels of a deceased person in one diocese; a test formerly in use to know in what court to seek probate, now unnecessary by 20 & 21 Vic., c. 77 = (S) not used; confirmation is applied for in the district where the principal domicile was; or if none, where the deceased had lived for forty days preceding his death, 680.

——— VACANTIA (E) goods which nobody claims = (S) *quod nullius est*, 10.

BOND (S) which is not under seal, and is not for double the amount lent = (E) the same, except that it is under seal, and is for double sum lent.

——— with clause of registration, 130, 448; to pay money, 448.

BOND AND DISPOSITION IN SECURITY (S) = (E) mortgage.

——— generally, 89; its form, 90; old forms, 91; as to the fee, 92; must be registered, 93, 94; assignation or translation of, 95, 96; by way of cash credit, 97; what interest recoverable, 98; as to title deeds, 99; how far absolute conveyance, 101; goes to heir, 102; how vests, 103; notice on paying off debt, 104; defective bond, 105; power of sale, 106; creditor may poind the ground, 107; may enter into possession, 108; may get judicial sale, 111; his remedies, 113; test of priority is registration, 114; no reconveyance necessary, 115; costs on transaction, 116; debtor's right to redeem, 120; vote at elections, 122; deposit of title-deeds not equivalent to bond, 123-8.

——— OF CAUTION (S) = (E) a bond entered into by a surety.

——— OF CORROBORATION (S) = (E) bond given as further security.

——— OF PRESENTATION (S) *i. e.*, a bond given by a person to obtain the temporary liberation of a debtor in custody, on a legal warrant. The obligant binds himself to reproduce the debtor at a certain day and place, otherwise himself to be liable = (E) not known, except as a bail bond, which only is used in cases where the defendant has not been previously in custody, but has been arrested on mesne process, *i. e.*, before judgment.

——— OF RELIEF (S) = (E) bond of indemnity.

BOND, RESIGNATION (E) a bond given by a clerk or parson to resign a benefice at a future time, in favour of some one named or to be named = (S) not known, 997.

BONUM VACANS. *See* "Bona Vacantia."

BOOKING A PRISONER (S) which is evidence of notour bankruptcy = (E) so lying in prison for twenty-one days is an act of bankruptcy, 1178.

BORDER WARRANT (S) *i. e.*, to arrest persons or goods = (E) warrant to arrest absconding debtors, 1140; but no jurisdiction is founded by attaching goods, 1247.

BOROUGH (E) = (S) Burgh.

——— ENGLISH (E) *i. e.*, a tenure of land by which land goes to youngest son = (S) not known, 15, 757.

BOX-DAYS (S) = (E) no term, but a judge both in Ch. and at C. L. attends to applications during vacation.

BRAWLING in a church or churchyard (E) *i. e.*, creating a disturbance or committing offence there = (S) no term.

BREACH OF ARRESTMENT (S) = (E) disobedience of rule for attachment of debt.

——— OF CONTRACT or promise, or breaking a contract (E) = (S) same.

——— OF TRUST (S) *i. e.*, a crime = (E) fraudulent appropriation by trustee.

BREAKING OF PRISONS (S) = (E) prison breach.

BREVI MANU (S) = (E) not used; without any authority of a magistrate or judge.

BRIEF (E) = (S) memorial for counsel, 1211.

BRIEVE (S) *i. e.*, an old chancery writ = (E) writ.

——— (S) = (E) similar writings are generally called "writs" (E).

——— OF DIVISION amongst heirs-portioners (S) = (E) a bill of partition in Ch. among co-parceners, 164.

——— OF IDIOTCY AND FURIOSITY (S) = (E) commission *de lunatico inquirendo*, 801.

BROCARD (S) or law maxim = (E) the same, but little used.

BROKER in London requires license, 615.
BUILDING ON ANOTHER'S GROUND, 386.
——— LEASE, 385; building feu, *ib.*
BURDEN ON LAND (S) = (E) charge on land.
——— RESERVED (S) = (E) rentcharge by reservation, 327.
BURGAGE HOLDING or tenure (S) = (E) not known, 15; but *see* "Borough, English."
BURGESS (S) = (E) the same; also councillor or common councilman in a borough.
BURGH (S) = (E) Borough.
BURIAL in parish churchyard, 1011.
BURGLARY (E) *i. e.*, breaking into dwelling-house during night = (S) no specific term; housebreaking with an aggravation.
BURSARY in Universities (S) = (E) exhibition or scholarship.
BUYING OF PLEAS (S) = (E) champerty, 458.

CADUCIARY RIGHT (S) a right which is acquired, not by succession = (E) no term; escheat is an example.
CALL, ecclesiastical (S) *i. e.*, where, after a clergyman has received a presentation and preached his trial sermons, the parishioners are invited to sign a call, after which the Presbytery moderate in his call = (E) not known; parishioners have no voice in appointment of parsons, etc., 993.
CALLING OF ADVOCATIONS and Suspensions (S) = (E) setting down an appeal or moving for a certiorari, according to circumstances.
——— OF PLAINTIFF (E) *i. e.*, at a trial at *nisi prius* it is necessary to call the plaintiff before a nonsuit is entered, for he can only be nonsuited with his own consent. He is called and does not answer, whereupon a nonsuit is entered = (S) not used.
——— OF SUMMONS (S) so called from the clerk of court requiring to read over the names of the parties, which he did from a *partibus* (præcipe E) written on the margin of the summons. The defender then required to appear, *i. e.*, give the name of his counsel and defendant. Instead of this ceremony there is now substituted a calling list in which the names are entered = (E) not known; return day of summons or time for entering appearance, 1070, 1153.
CALUMNY, Oath of (S) *i. e.*, an oath to be taken by a party at the commencement of a cause that the facts set forth by him are true. The oath was ordered by Stat. 1429, c. 175, but was nearly superseded by the practice of judicial examination; and now, since parties can generally be examined as witnesses, the oath is little known, and is supposed to be incompetent; see *Paul* v. *Laing*, 17 D. B. M. 604. But it is still put to the pursuer in actions of divorce and some actions of declarator of nullity of marriage, to guard against collusion between spouses = (E) not known; groundless actions and defences are in general unrestricted, 1106.
CAMPBELL'S ACT for remedy of injuries resulting in death (E) 511.
CANCELLING deeds, etc. (E) a suit may be instituted in the Court of Chancery to have deeds delivered up to be cancelled = (S) action of reduction or reduction-improbation.
CAPIAS (E) or *capias ad respondendum*, *i. e.*, a writ issued only in those actions at law where the defendant can be arrested on mesne process, viz., where

be is about to leave the county, the writ being issued to the sheriff, directing him to take and keep the defendant until he give bail or otherwise = (S) a *meditatio fugæ* warrant, often called a *fugæ* warrant, which can be had from any justice of the peace, 1140.

CAPIAS AD AUDIENDUM JUDICIUM (E) *i. e.*, a writ by which a person who has been tried in his absence for misdemeanour, and found guilty, is brought up to the court to receive sentence = (S) warrant to apprehend.

——— AD SATISFACIENDUM or *ca. sa.* (E) *i. e.*, the writ of execution by which after judgment a creditor directs the sheriff to arrest the judgment debtor, and take him to prison, until the debt and costs are paid and satisfied = (S) caption, which is now superseded in practice by a warrant to imprison, which is authorized to be obtained on registration of execution of a charge given to the debtor to pay, 1126.

——— IN WITHERNAM (E) *i. e.*, a writ in the action of replevin, directing the sheriff to seize goods of the distrainer, where those replevied cannot be found = (S) not known.

——— UTLAGATUM (E) *i. e.*, a writ of execution by which the sheriff is directed to take a defendant who has been proclaimed an outlaw = (S) caption, after letters of horning.

CAPTION (S) formerly the only civil warrant for apprehending a debtor for non-payment of a debt. It proceeded on the fiction that the debtor had become a rebel for disobeying the charge to pay, and hence the Sovereign ordered all messengers-at-arms to apprehend him, etc. The writ is now superseded by the warrant to imprison, 1126 = (E) if, on final judgment, *capias ad satisfaciendum*, or ca. sa.; called attachment both at C. L. and Ch., if for contempt of court in not obeying some rule or order.

——— (E) *i. e.*, part of an indictment so called, stating where, when, and by what authority it was found. It is no part of the indictment, but is merely prefixed as a preamble when the record is made up = (S) not known.

CAPTION PROCESS (S) *i. e.*, a summary warrant to apprehend a party who has borrowed a process (the record E) from the clerk of court, and who contumaciously retains it, 1084 = (E) attachment for contempt; but papers are not kept in courts of C. L. and lent out in the same way.

CARRIAGE OF A DECREE, *i. e.*, a solicitor in a suit in equity is said to have the carriage of the decree, when he is interested in pressing it on = (S) not used; but the real pursuer acts in like manner.

CASE OR MINUTE OF DEBATE (S) = (E) written or printed argument, not known in any court except in House of Lords.

——— FOR OPINION OF COUNSEL (E) = a memorial for opinion of counsel (S).

——— ACTION ON THE (E) *i. e.*, all actions for redress of wrongs and injuries which do not fall under the other established forms of covenant, debt, detinue, trespass. Actions on the case are better known under the name of special actions, as slander, malicious prosecution, assumpsit, trover, deceit, etc. = (S) no term; action of damages.

——— SPECIAL (E) is a statement of facts drawn up with or without pleadings and agreed upon by both parties, and the court is asked to apply the law to it = (S) not known.

CASH-CREDIT WITH BANK (S) explained by Lord Brougham in *Swan* v. *Bank of Scotland*, 2 Sh. and M'L. 67 = (E) unusual, bond of guarantee and indemnity, 1059; also inferior to equitable mortgage, 123.

CASH-CREDIT SECURITY over land, 97.

CASSETUR BREVE (E) *i. e.*, an entry made by a plaintiff who finds a plea in abatement is well founded; it puts an end to the action, and he can begin anew = (S) not used; interlocutor sustaining a dilatory or preliminary plea, 1073.

CASUAL EJECTOR (E) old name used in actions of ejectment for Richard Roe, now abolished = (S) not known, 425.

——— HOMICIDE (S) = (E) homicide by misadventure.

CASUALTIES OF SUPERIORITY (S) = (E) incidents of copyhold tenure, such as fines, quit-rents, heriots, 179; in freeholds such incidents only exist where a lord can now be traced, which is rarely, 21.

CATCHPOLE (E) a popular but not technical name given to a sheriff's bailiff = (S) messenger-at-arms.

CATHOLIC CREDITOR (S) *i. e.*, as distinguished from a secondary creditor = (E) creditor having a double security, *i. e.*, two or more funds to resort to, 693, in which case the securities are marshalled.

CAUTIO JUDICIO SISTI (S) *i. e.*, caution to produce the party at all diets of court when required = (E) finding special bail, who are discharged by rendering the principal, 1140.

——— USUFRUCTUARIA (S) *i. e.*, caution by liferenters against waste = (E) not necessary, but an undertaking may be given by defendant in a suit for injunction for impeachment of waste, 70.

CAUTION (S) = (E) security, guarantee, bail, 620.

——— BOND OF, in judicial proceeding (S) = "Recognizance," "Bail Bond;" bond with sureties.

——— JUDICATUM SOLVI (S) *i. e.*, caution formerly required in maritime suits that the debt should be paid; abolished in the Court of Session by 13 & 14 Vic. c. 36, § 24 = (E) not known.

——— JURATORY (S) *i. e.*, where a party is unable to procure other caution, he gives up an inventory of his effects, and assigns them in security to the opposite party = (E) not known, but recognizance is a security entered into to the Crown in like circumstances.

——— IN LAWBURROWS (S) = (E) bail given on entering into articles of the peace.

CAUTIONARY OBLIGATION (S) = (E) suretyship or guarantee.

CAUTIONER (S) = (E) surety.

——— JOINT (S) = (E) joint or co-surety.

CAVEAT (E) = (S) the same.

CEDENT (S) = (E) assignor.

CENTRAL CRIMINAL COURT (E) *i. e.*, a court sitting at the Old Bailey, London, for the trial of all criminal cases for London, Middlesex, and the parts adjoining thereto, having sittings once a month, the common law judges sitting as judges by rotation = (S) Court of Justiciary, 940.

CEPI CORPUS (E) *i. e.*, the name of a return made by a sheriff who has executed a *ca. sa.*, and has taken the body of the debtor = (S) not used.

CERTIFICATE OF ACKNOWLEDGMENT (E) *i. e.*, of a deed executed by a married woman before commissioners appointed for that purpose = (S) notarial act ratifying a judicial ratification by a wife, 887.

——— OF APPOINTMENT (E) of assignees in bankruptcy = (S) act and warrant confirming a trustee in a sequestration.

CERTIFICATE, BANKRUPT'S (E) *i. e.*, the certificate given by the commissioner in bankruptcy to a bankrupt on his discharge = (S) discharge, 1180.

——— TRIAL BY (E) in a few cases questions of fact at common law are tried, not by a jury, but by a certificate of some functionary, as of a bishop, of the mayor, etc., of London = (S) not known, but the judge or court, except in certain enumerated cases, may take the evidence otherwise than before a jury.

CERTIFICATION (S) *i. e.*, a notice to a party in a suit that if he fail to do something, certain consequences will follow = (E) no term at C. L.; like a "notice to plead, otherwise judgment," etc.; or a rule absolute to do something, on non-compliance of which, attachment may be obtained. So, if an order in Ch. is not obeyed, an attachment may be obtained.

CERTIFIED COPY (E) = (S) extract.

CERTIORARI, WRIT OF (E) *i. e.*, writ from superior court, removing a cause from inferior court = (S) advocation, also suspension and advocation.

CESS OR LAND TAX (S) = (E) land tax, also a rate.

CESSER (E) proviso causing a term to cease = (S) no phrase; irritancy, dissolving condition, 75.

CESSIO BONORUM (S) *i. e.*, a process applicable to small bankruptcies, where the debtor applies for protection from imprisonment, on giving up his property to his creditors = (E) similar protection is given in the Insolvent Debtors' Court, which is applicable, however, to non-traders, and is not necessarily confined to small insolvencies, 1186.

CESSIONARY (S) = (E) assignee.

CESTUI QUE TRUST (E) = (S) beneficiary.

CESTUI QUE USE (E) old name for *cestui que trust*, under the Statute of Uses.

CESTUI QUE VIE (E) *i. e.*, if B has an estate for the life of A, then A is the *cestui que vie* = (S) no term, 55, 58.

CHALKING DOORS (S) *i. e.*, old mode of warning burgh tenants, which is still competent, and is good notice to quit. The officer who chalks subscribes a certificate or execution of chalking, which is ground for a warrant from the Burgh Court of summary removing = (E) not known, but a notice is sometimes affixed to a door in actions of ejectment, when the party cannot be found.

CHALLENGE OF JURY in criminal cases, 969.

——— OF JURORS (E) = (S) the same.

CHAMPERTY (E) *i. e.*, where a party not in possession affects to sell an estate = (S) *pactum illicitum* or *pactum de quota litis*, 458.

CHANCELLOR OF JURY (S) = (E) foreman of jury.

——— OF A DIOCESE (E) *i. e.*, a law officer who determines matters of law, and holds the Bishops' Court = (S) not known. The Presbytery, with their chairman or moderator, do part of like duties.

CHANCE MEDLEY (E) or chaudmelle, *i. e.*, old name for a casual affray or quarrel, issuing fatally = (S) chaudmelle, also used in old law.

CHANCERY (S) *i. e.*, an office (but not a court) recording Crown and other charters and writs, and through which office all charters, etc., from the Crown to tenants *in capite*, or feudal superiors, pass = (E) the Court of Chancery is a court of equity.

——— COURT OF (E) jurisdiction of, 1052, 1151; outline of suit in, 1152.

CHAPEL (E) *i. e.*, a church separate from the mother parish church; also

a place of worship for Dissenters = (S) "church" is the name used for both indifferently.

CHAPTER (E) a meeting of the clergy, under the dean, in a cathedral church = (S) not known; the presbytery performs analogous duties.

CHARGE AGAINST SUPERIOR (S) *i. e.*, to enter heirs, disponees, etc. = (E) not known, except in copyhold, where it is in the form of a mandamus to admit tenant.

——— GENERAL (S) = (E) not known. See *infra*, "Charge to enter Heir."

——— ON DECREE OR WARRANT (S) = (E) not known, and not needed at C. L., 1118; but in Ch. notice of decree must be served before it can be enforced, 1160.

——— ON LAND (E) = (S) real burden, or *debitum fundi;* also real security, 269; rentcharge, 265.

——— SPECIAL (S) = (E) not known. *See* "Charge to enter Heir."

——— TO CONFIRM EXECUTOR (S) = (E) citation to prove the will in solemn form.

——— TO ENTER HEIR (S) *i. e.*, a writ commanding a person to enter heir to his predecessor within forty days, otherwise an action would be raised against him as if he had entered. The heir might appear, and renounce the succession whereon a decree *cognitionis causa* passed, ascertaining the creditor's debt. If the heir did not appear, then he became personally liable to the creditor. A charge was either general or special, or general-special. These are now abolished by 10 & 11 Vic., c. 48, § 16, and a summons of constitution against the unentered heir substituted = (E) not known, because real estate vests in heir-at-law at the moment of ancestor's death, and he is not liable for his ancestor's debts beyond the value of the real estate descended, 779 *et seq.*

CHARITABLE USES (E) *i. e.*, by the Statute of Mortmain, 9 Geo. II., c. 36, a person cannot by will devise land or bequeath money to be laid out in purchasing land for a charitable use—as for a school, church, charity, etc.; but several recent exceptions have been made by statute. If the party make the gift by deed executed more than twelve months preceding his death, and enrolled in the Court of Chancery, he can do so effectually = (S) not known, and no such restriction as to the application of land money exists, but no land can be disponed by will, nor in general within sixty days before death, by reason of the law of death-bed.

CHARITY (S) *i. e.*, relief to paupers by the Poor Law authorities = (E) parochial relief.

——— (E) *i. e.*, a foundation for the relief of certain persons by alms, education, or otherwise = (S) hospital; mortification.

CHARTER (S) = (E) grant.

——— (S) *i. e.*, the deed by which a superior grants, or renews, or transmits a feu to the vassal = (E) grant in copyholds; in freeholds, not known and not needed.

——— BY PROGRESS (S) *i. e.*, any charter after the original charter, renewing or confirming the vassal's title = (E) not known and not needed.

——— OF ADJUDICATION (S) = (E) in copyholds, admittance of creditor under an execution of *elegit;* in freeholds, not known.

——— OF ADJUDICATION IN IMPLEMENT (S) = (E) possession by a vendee after decree of specific performance in sale of land, 318.

CHARTER OF CONFIRMATION (S) = (E) not known, and not required in freeholds; in copyhold, admittance, 187.

——— OF RESIGNATION (S) = (E) in freeholds, not known; in copyholds, memorandum of surrender and admittance, 187.

CHATTEL (E) = (S) a corporeal moveable; goods and chattels is a common expression for all corporeal moveables. In (S) goods and gear is often used, but "gear" means money.

——— INTEREST IN LAND (E) such as a lease or mortgage.

——— REAL (E) such as leases and mortgages = (S) no general term; incorporeal rights connected with land.

CHILD-STEALING (S) a crime punishable capitally = (E) not known; abduction.

CHIROGRAPHUM APUD DEBITOREM REPERTUM PRÆSUMITUR SOLUTUM (S) = (E) possession of a receipt or security is a *præsumptio juris*, but rebuttable by evidence.

CHOSE IN ACTION (E) = (S) a debt or *jus exigendi* or *crediti*.

——— IN POSSESSION (E) = (S) a corporeal moveable in present possession.

CHRISTMAS DAY (E) a holiday = (S) not known; as to bills of exchange due on, 562.

CHURCH (E) *i. e.*, a place of worship belonging to the Established Church, for Dissenters can only worship in a *chapel* = (S) "church" is used for both Established and Dissenting places of worship.

——— convocation, 992; orders of clergy, 992; parsons and vicars, 993; church discipline, 995; jurisdiction as to wills and marriage, 996; advowsons, 997; pluralities, 998; freehold of church, 999; erection of new churches, 1000; churchwardens, 1001; church rates, 1002; parish officers, 1005; pews, 1007; churchyard, 1010; right of burial, 1011; residence of clergy, 1013; glebe, 1018; tithes, 1019.

——— RATE (E) = (S) expense of repairing church, 1002; as between landlord and tenant, 390.

——— SEAT IN (S) = (E) pew.

——— WARDENS (E) = (S) not known; like duties fall chiefly on heritors and kirk-sessions, 1001.

——— YARD, right to trees, etc., in, 1010.

CIRCUIT COURT OF JUSTICIARY (S) for which purpose Scotland is divided into three circuits—North, West, and South. Counsel can attend all or either as they think proper. The judges of the Court of Justiciary may also try civil cases, but this is seldom done = (E) Crown Court at the assizes. At the assizes are also tried all civil actions of which the cause has arisen in the respective counties, and the greater part of the business is civil business. Counsel are not allowed to attend more than one of the eight circuits, except by special retainer; and after fixing on a circuit, cannot afterwards change without leave of the members of the new circuit chosen.

CIRCUITS (S) = (E) the same. *See* "Circuit Court of Justiciary."

CIRCUITY (E) = (S) undue accumulation of actions.

CIRCUMDUCTION (S) *i. e.*, a phrase for the court closing the term for lodging papers, or doing anything else in a cause = (E) no term. The Court appoints a time for the party to plead, etc., peremptorily, on the expiry of which time he is precluded from doing so. In C. of Ch., notice is issued for creditors and next of kin to come in within a certain time, otherwise to be precluded from the benefit of the decree.

CIRCUMVENTION (S) = (E) included under fraud or insanity.

CITATION (S) after summons = (E) service of writ of summons at C. L., 1069; service of the bill, claim, etc., in Ch., 1153.

———, EDICTAL (S) *i. e.*, a mode of citing parties who are either foreigners resident abroad, or persons having no residence in Scotland, called "furth of Scotland," or who have left their ordinary residence, leaving no address. The citation was formerly published at the market cross of Edinburgh, and pier and shore of Leith, but now may be left at the office of the keeper of edictal citations, 1060 = (E) not known, and not competent to serve persons abroad in this way, personal service being in general necessary; but if a person is keeping out of the way, and knows of the proceeding, the plaintiff may, both at C. L. and in Ch., obtain leave for substituted service, 1069, 1153.

——— IN CRIMINAL CASES (S) = (E) summons in first instance, or warrant to arrest by a justice of the peace; if by sessions or assizes, a subpœna.

——— OF WITNESSES AND HAVERS (S) = (E) service of subpœna, and subpœna *duces tecum.*

CLAIM (E) *i. e.*, certain suits in Ch. may commence with a claim instead of a bill = (S) summons in an action.

——— of enrolment as voter (S) = (E) same.

——— on bankrupt's estate (S) = (E) claim to prove a debt.

CLANDESTINE MARRIAGE (S) *i. e.*, marriage without proclaiming banns, and without the services of a clergyman = (E) not known, but there may be marriage in registrar's office, 862, 863.

CLARE CONSTAT, PRECEPT OF (S) *i. e.*, a deed by which a superior declared he was satisfied that A was the heir of B, and authorized him to be entered accordingly = (E) in copyholds, admittance of heir, 187; in freeholds not known, because unnecessary.

CLAUSE OF DESTINATION (S) = (E) the limitation, which is part of the habendum, 361.

——— OF DEVOLUTION (S) *i. e.*, a clause in the articles of roup (conditions of sale E), whereby if the highest offerer do not complete, the next highest bidder shall be declared the purchaser = (E) not used as a condition of sale, but in like circumstances, there is generally reserved a power to rescind the contract and re-sell.

——— OF DURATION IN LEASE (S) = (E) part of habendum, 377.

——— OF MELIORATIONS (S) = (E) covenant or proviso as to repairs and improvements, 377.

——— OF POSSESSION IN LEASE (S) = (E) parcels.

——— OF PRE-EMPTION (S) = (E) covenant for pre-emption.

——— OF REGISTRATION (S) = (E) not known, because, in general, there are no registers for deeds, 370, 448.

——— OF REMOVAL (S) = (E) covenant to yield up possession and quit the premises, 377.

——— OF RENT (S) = (E) reddendum and covenant to pay rent, 377.

——— OF RETURN (S) = (E) reversion, which is implied, if entire estate is not given away, 37.

——— OF WARRANDICE (S) = (E) covenant for quiet enjoyment, 377.

——— DISPENSING WITH DELIVERY (S) = (E) not known, 361.

——— DISPOSITIVE (S) of a deed = (E) it includes the attestation clause and the parcels, as well as the habendum, 361.

CLAUSES IN DEEDS, etc. (S) = (E) parts of deeds, some being called covenants, also conditions, 361.

——— IRRITANT AND RESOLUTIVE (S) in entails = (E) proviso or condition of nullity or cesser, and gift over, 32.

CLERGY, ORDERS OF, 992. *See* "Church."

CLERK (E) the proper legal addition or designation of a clergyman of the Church of England = (S) not used; minister.

——— OF JURY CAUSES (S) now clerk of session = (E) associate.

——— OF SESSION (S) = (E) at C. L., master of the court. In Ch., registrar of the court.

CLERKS TO THE SIGNET (S) old name for writers to the signet = (E) attorneys or solicitors, 1219.

CLOSE (E) *i. e.*, a field or piece of land enclosed or otherwise, wherein, if a stranger trespasses, an action of trespass *quare clausum fregit* lies = (S) not used; a close is the name often given to a court or alley.

CLOSING THE RECORD (S) = (E) joining issue, 1077.

CO-CREDITORS (S) = (E) joint creditors.

COGNATE (S) = (E) not used; a relation through the mother's side.

COGNITION AND SALE of pupil's estate (S) = (E) sale by order of court, 807.

——— AND SASINE (S) *i. e.*, a mode of entering an heir in burgage subjects, 15 = (E) not known in freeholds; in copyholds, admittance.

COGNITIONIS CAUSA, DECREE OF (S) *i. e.*, decree where heir renounces after being charged to enter heir = (E) not known, because heir cannot renounce, and does not require to do so, 779.

COGNIZANCE OR COGNISANCE (E) the plea in an action of replevin, whereby the defendant admits he took the goods, but did it as the servant of another = (S) not used.

COGNOVIT ACTIONEM (E) *i. e.*, a document by which a defendant in an action, to save the time of the plaintiff, confesses the action. It must be executed in presence of an attorney, specially attending on the part of the defendant, 1117 = (S) not known; consent to an interlocutor of court. If there has been in a bond a clause of consent to registration for execution, the same effect is produced, for a decree of registration may be had without action. So as to bills of exchange, 567.

COHABITATION (S) = (E) same, but it does not constitute, though it is admissible as evidence of marriage, when marriage requires only incidentally to be proved, 861.

CO-HEIR (E) = (S) not used; heir-portioner.

COIF (E) the badge or patch on the top of the wig of a sergeant-at-law denoting his rank = (S) not known; there are no sergeants-at-law.

COLLATION (E) *i. e.*, the presentation and institution of a clerk in holy orders by the bishop as patron = (S) not used; ordination by the presbytery, but they are never the patrons, unless the lay patron has neglected, and so the right has become *jus devolutum*, 993.

——— (S) = (E) bringing into hotch-pot, 741.

COLLEGE OF JUSTICE (S) *i. e.*, a body consisting of judges, advocates, and W.S. and S.S.C. = (E) no such body. A judge in (S) is often called a Senator of the College of Justice. A common law judge in (E) must be a sergeant-at-law.

COLLISION OF SHIPS, lien for damage caused by, in (E), 582. *Contra* in (S) *ib.*

COLOUR (E) *i. e.*, a term formerly sometimes used in pleading to denote, that

a pleading by one party in confession and avoidance must admit some apparent right in the opposite party, and then displace it by new matter = (S) not known.

COMITATUS, POSSE (E) *i. e.*, the assembly of all the officers and men in the country to aid in seeing the Queen's writ obeyed = (S) also used.

COMMENDAM (E). A living *in commendam* was a living held by one clergyman for a temporary period. It is now incompetent to grant a living *in commendam*, 6 & 7 W. IV., c. 18 = (S) not known.

COMMENDATORY (E) one holding a living *in commendam* = (S) not known.

COMMISSARY, now the Sheriff (S). The jurisdiction of the old commissaries in the matter of confirmation was transferred to the Sheriff, and their jurisdiction as to divorce and marriage to the Court of Session, 4 Geo. IV. c. 47; 1 W. IV. c. 69; 6 & 7 W. IV. c. 41; 13 & 14 Vic. c. 36 = (E) the Court of Probate and Court of Divorce.

COMMISSION OF BANKRUPTCY (E) old name for adjudication of bankruptcy = (S) award of sequestration, 1175.

——— OF LUNACY (E) or *de lunatico inquirendo* = (S) brieve of furiosity, 800.

——— OF REBELLION (E) *i. e.*, a process formerly used to enforce obedience to a decree or process of the Court of Chancery, now abolished = (S) like denunciation after letters of horning, or putting to the horn.

——— DAY (E) *i. e.*, the day on which the assizes commence in country towns = (S) not used; first diet of court.

——— TO EXAMINE WITNESSES ABROAD (E). If it is to examine witnesses within the jurisdiction, it is called at C. L. an order to an examiner for the examination of witnesses = (S) act and commission; also commission for taking proof, 1093, 1094.

COMMISSIONER OR FACTOR (S) = (E) steward or bailiff on estate, or person authorized by power of attorney.

COMMISSIONERS OF SUPPLY (S). *See* 17 & 18 Vic. c. 91; 19 & 20 Vic. c. 93 = (E) commissioners of land tax.

——— OF BANKRUPTCY (E) *i. e.*, a judge in the Court of Bankruptcy = (S) the Sheriff, or Lord Ordinary respectively, there being no separate court.

——— ON A BANKRUPT ESTATE (S) = (E) creditors' assignees, 1175.

COMMITMENT (E) *i. e.*, the order or warrant by which a justice of the peace commits a person to prison = (S) also used.

COMMITTEE (E) *i. e.*, the person to whom the care and custody of a lunatic or idiot, or his estate, is committed by the Court of Chancery = (S) guardian or tutor-dative as to the person; curator bonis, also judicial factor, as to the estate. A curator bonis has greater power, and a judicial factor has less power than a committee. *Turnbull* v. *Cowan*, 6 Bell's Ap. 222.

COMMITTITUR PIECE (E) *i. e.*, the instrument in writing, charging a person already in prison = (S) not used.

COMMODATE (S) *i. e.*, gratuitous loan = (E) loan or bailment.

COMMON (E) *i. e.*, a right or privilege to take or use some portion of another man's lands or produce, 278 = (S) included in servitude.

——— of pasture, 279; of estovers, 280; of turbary, 281; of piscary, 282; powers of owner to enclose common, 283.

——— AGENT (S) *i. e.*, the agent or solicitor appointed by the court to conduct a cause in which several parties have a common interest, and

he is usually appointed in a ranking and sale, in a process of augmentation and locality, and in a multiplepoinding = (E) no term; an interpleading plaintiff, or party having carriage of a decree.

Common Council (E) the council of the city of London, out of whom aldermen are chosen = (S) town-council.

——— Counts (E) *i. e.*, certain short forms of alleging the cause of action in declarations at C. L., such as the count for goods sold, for money lent, for money paid, for work and materials, etc., so named from their common and universal use = (S) not known; all pleadings must go into greater details, and must give outline of the evidence, 1072.

——— Debtor (S) = (E) debtor of attaching creditor; in some cases the party interpleading; in the city of London called the debtor or defendant.

——— Good (S) *i. e.*, all the property belonging to a corporation, over which the magistrates have a power of administration = (E) not used; property of the corporation.

——— Interest (S) = (E) tenancy in common in an easement, 155.

——— Law, as distinguished from equity, 1052-55.

——— Law Courts, 1052, 1055.

——— of Piscary (E) = (S) right of fishing along with others, 6.

——— of Turbary (E) = (S) servitude to dig fuel, feal, and divot, 281.

——— Pasturage (S) = (E) common of pasture.

——— Pleas, Court of (E) or Common Bench, one of the Courts of Common Law = (S) Court of Session.

——— its jurisdiction, 1055.

——— Property (S) = (E) tenancy in common, 155; no survivorship except by express words, 157, 161, 172; division of, 160; destinations of, 170-172.

——— Socage, or freehold tenure (E) = (S) not known.

——— nature of, 14, 19, 20.

Commoner (E) *i. e.*, person having a right of common = (S) proprietor of a servitude or common proprietor.

Commonty (S) = (E) a common (used only in a popular sense) or waste, over which rights of common exist.

Communing (S) = (E) confidential or privileged communication, as between attorney and client; also any confidential meeting.

Communion of Goods (S) *i. e.*, during marriage = (E) not known, for marriage is a gift by the wife of all her goods to the husband; some of which, however, survive to her, unless he has reduced them into possession, 883, 885.

Communis Error (S) *i. e.*, an inveterate mistake in practice, which the court generally corrects by an act of sederunt = (E) seldom used; a bad practice, inveterate and general, which may be cured by a rule of court or an order of court.

Community, Estates in (E) = (S) common property, 154.

——— Municipal, or Corporation (S) = (E) municipal corporation.

Companion in joint tenancy, or tenancy in common (E) = (S) associate or co-owner.

Company (S) = (E) firm or partnership. In (E), when the term "company" is used technically, it always means a joint-stock company, or one acting under a charter or statute, not an ordinary partnership, 656.

COMPARATIO LITERARUM (S) = (E) the same, but little used; comparing handwriting of disputed documents with handwriting of documents already admitted to be genuine, 983, 1098.

COMPEARANCE (S) *i. e.*, of the defender in an action = (E) appearance.

COMPEARED (S) = (E) appeared.

COMPENSATIO INJURIARUM (S) *i. e.*, setting off one injury against another, which is allowed to some extent as a defence against actions of damages for slander and defamation, and other quasi-delicts. Thus, a claim of damages for libel in a newspaper may be extinguished by a counter-claim for another libel by the pursuer upon the defender. Latterly the courts have inclined against allowing this defence, and directing a cross-action to be raised. See *Gilchrist* v. *Dempster*, 3 Murr. 368, 369; Borthwick on Libel, 279, 433 = (E) it is not allowed to set off one trespass or tort against another; there must be a cross action, yet sometimes evidence of the cross trespass may be given if part of the *res gestæ*.

COMPENSATION (S) = (E) set-off, 485.

——— (E) *i. e.*, the satisfaction or acknowledgment which criminal courts have power to give to constables and others, active in the apprehension of offenders = (S) not used.

COMPETENT AND OMITTED (S) *i. e.*, those pleas or defences which might have been put forward, but which were not, are said to be competent and omitted. After the record is closed, they are not allowed to be added unless they are *res noviter veniens ad notitiam* (which may be made subject of a plea puis darrein continuance E). The plea is not competent against a pursuer; but, after decree, if the pursuer sue on the same *media concludendi*, he will be met with a plea of *res judicata* = (E) no general term; too late; defendant waives pleas in abatement by pleading in bar, and it is too late then to add them. The court will not arrest judgment on a ground that might have been pleaded. Verdict is said to cure many defects or omissions in pleadings.

COMPETITION (S) = (E) not used; what takes place in an interpleader or administration suit in Ch., or under a rule of interpleader at C. L., or in a marshalling of securities.

COMPOSITION TO SUPERIOR (S) = (E) in copyholds, a fine; in freeholds, not known.

——— (E) *i. e.*, an agreement or contract between a parson, patron, and ordinary, to substitute money or other thing in lieu of tithes = (S) commutation of teinds.

COMPOUND INTEREST (S) = (E) same, 482.

COMPOUNDING *qui tam*, or penal actions (E) *i. e.*, where an informer sues for a penalty, the defendant is allowed to compound or compromise the matter, with leave of the court and of the Crown = (S) not used.

COMPREHENDING ACTS (S) *i. e.*, certain old acts, authorizing the taking up of idle persons, and causing them to serve as soldiers.

COMPRISING OR APPRISING (S) *i. e.*, old name for adjudication = (E) alegit.

COMPROMISE OR TRANSACTION (S) = (E) compromise, which, however, is not a technical term.

COMPULSION (S) or constraint, or force and fear = (E) duress.

CONCLUSIONS OF THE LIBEL (S) = (E) counts of the declaration at C. L.; prayer of the bill or claim, or petition in Ch., 1068.

CONCOURSE OF ACTIONS (S) *i. e.*, where for the same cause a prosecution which

proceeds *ad vindictam publicam*, and a prosecution or action *ad civilem effectum* go on concurrently = (E) several actions or remedies for one cause. If both a civil and a criminal remedy is resorted to, the latter will be stayed till the prosecutor elect which remedy he will have.

CONCOURSE OF LORD ADVOCATE (S) = (E) like concurrence of the Attorney-General in certain cases.

CONCURRENCE (S) *i. e.*, of one justice of the peace to a warrant issued by another = (E) backing of warrant.

CONDESCENDENCE (S) = (E) "declaration," at C. L.; "bill," and also "claim" in Ch. A statement of facts is not a separate and distinct part of the pleading in (E), 1072, 1152.

CONDICTIO INDEBITI OR REPETITION (S) = (E) action for money had and received.

CONDITIO SI SINE LIBERIS DECESSERIT (S) = (E) the doctrine is not acknowledged except in devises and legacies to children, 700, 722; a will is not revoked by children being afterwards born, 676.

CONDUCTOR (S) *i. e.*, the person hired in a contract of location = (E) the bailee.

CONDITIONS IN FEUDAL GRANTS (S) = (E) covenants in conveyances of real estate running with land, 79.

——— POTESTATIVE (S) *i. e.*, when it is in the party's own power to perform them = (E) no term, 85.

——— PRECEDENT (E) = (S) same; also suspending conditions, 85.

——— REPUGNANT, 32, 52, 86.

——— SUBSEQUENT (E) = (S) same; also resolutive or dissolving conditions, 85.

CONDITIONAL INSTITUTE (S) = (E) donee in gift or grant. Legatee with substituted legatees; in legacy, 703; in dispositions, 728.

——— OBLIGATION (S) = (E) Agreement or covenant to pay or do something on a condition.

CONDONATION (S) = (E) same.

CONFESSION AND AVOIDANCE (E) *i. e.*, the term in pleading used to denote that the party admits the facts stated by his opponent, but seeks to displace their effect by some new matter = (S) not used.

——— (S) *i. e.*, acknowledgment or admission of guilt before magistrate or court = (E) the same.

CONFIDENT PERSON (S) = (E) not used; a grantee in a voluntary or fraudulent conveyance.

CONFIDENTIALITY (S) = (E) privilege; thus a letter by an attorney is a privileged communication.

CONFIRMATION (E), *i. e.*, where one party having the right to land, and the other having the possession, the former grants what is in him to the latter = (S) not used; charter or disposition according to circumstances.

——— (E) 813 = (S) homologation or ratification by minor of a deed or contract on his coming of age.

——— BY A SUPERIOR (S) = (E) in copyholds, "admittance after surrender;" in freeholds not known, 187, 364.

——— OF A TESTAMENT (S) = (E) "probate," if there is a will; "letters of administration," if there is no will, 680; "to be confirmed executor nominate," (S) is (E) "to prove the will as executor;" "to be confirmed as executor-dative or executor-creditor," (S) is (E) "to obtain letters of administration as administrator;" vesting of estate, 681.

CONFISCATION (S) = (E) forfeiture to the Crown.

CONFORM TO (S) = (E) pursuant to. Thus an execution must in (S) be conform to its warrants. In (E) the execution must pursue the judgment.

CONFUSION (S) = (E) (included in) release or discharge by operation of law.

CONGE D'ELIRE (E) *i. e.*, the name given to the Queen's license sent to a dean and chapter to proceed in electing a bishop = (S) not known.

CONJOINING PROCESSES (S) = (E) consolidating actions at C. L., 1080.

CONJUNCT RIGHTS (S) = joint rights (E) in land, 154, 172; in contracts, 627.

——— FEE (S) conveyance in, (which must be by deed) to A, B, and C = (E) tenancy in common of real estate for life if by deed; tenancy in common in fee if by will, 172.

——— FEE AND LIFERENT (S) = (E) joint tenancy of a life estate, and tenancy in common of the remainder in fee, 172.

——— right to two jointly and the longest liver (S) = (E) joint gift to two, 172.

——— AND CONFIDENT (S) = (E) person to whom a voluntary or fraudulent conveyance is made.

CONJUNCTION OF PROCESSES (S) = (E) consolidating of actions or suits.

CONJUNCTLY AND SEVERALLY (S) = (E) jointly and severally.

CONQUEST (S) (in heritable succession), *i. e.*, land purchased by a party. Thus where a middle brother dies intestate, having acquired land by purchase, the property goes not to the younger but to the elder brother = (E) purchase which includes all titles by which property is acquired, except that by descent; as to succession in, 758.

——— (S) (as in marriage contracts or *acquirenda*) = (E) subsequently acquired estates or interests, or after-acquired property, 930.

CONSANGUINITY (S) = (E) same.

CONSENSUAL CONTRACTS (S) *i. e.*, which require consent and nothing more = (E) not used, consent being implied in all contracts.

CONSENTER TO A DEED (S) = (E) one who concurs or joins in the deed, or is a party to the deed.

CONSIDERATION (S) = (E) same; of simple contracts, 441; of bills of exchange, 550.

CONSIGN IN COURT (S) = (E) pay into court.

CONSIGNATION (S) *i. e.*, depositing money whichis the subject of dispute in the hands of a third party, generally a bank, where money is consigned; it stops the liability of the consigner to pay interest = (E) paying or bringing of money into court, or paying to a stakeholder. But paying into the hands of a stakeholder is unusual, and has not the effect of stopping interest.

CONSISTORIAL COURT (S) = (E) Court of Divorce and Matrimonial Causes.

CONSOLIDATION (S) = (E) merger.

——— (E) *i. e.*, uniting of two benefices into one = (S) annexation.

——— OF ACTIONS (E) = (S) conjoining processes, 1080.

CONSTABLES (S) = (E) same, also called "peace officers."

CONSTITUTION (S) action of = (E) action to recover a debt or damages, thereby converting the claim into a liquidated sum.

——— decree of (S) = (E) judgment or decree establishing a debt against an heir or executor.

CONSTRUCTIVE TRUST (E) = (S) implied trust, 223.

CONSULTATION OF JUDGES (S) *i. e.*, where the judges of one division of the Court of Session consult the other division before deciding a cause, there being no appeal from one to the other = (E) not known. Courts of C. L. cannot so consult each other; but there is an appeal from any one to the two others sitting as the Exchequer Chamber.

CONSUMMATE (E) tenant by curtesy; *i. e.*, when the husband's right to curtesy is completed by the birth of issue inheritable = (S) not used; completed.

CONTEMPT OF COURT (S) = (E) the same.

CONTERMINOUS PROPRIETORS on river banks (S) = (E) riparian owners.

CONTINGENCY OF PROCESS (S) = (E) ground for consolidation of actions, 1080.

CONTINGENT DEBTS (E) *i. e.*, debts which may or may not arise in future, but which do not at present exist = (S) the same.

——— REMAINDER (E) a remainder not vested, and which may never vest = (S) no term, 147.

CONTINUANCE (E) notice of trial by, *i. e.*, where notice of trial, in London or Middlesex, has been given, and the plaintiff is not ready, he may, instead of countermanding, give notice by continuance till the next sitting = (S) not used.

CONTINUATION OF THE DIET (S) = (E) adjournment of the hearing or trial; enlargement of time for pleading, etc. The time for entering appearance is peremptory.

CONTRA FORMAM STATUTI (E) *i. e.*, the name given to the formal conclusion of indictments = (S) not used.

——— NON VALENTEM AGERE (S) or *non valentia agere* = (E) *i. e.*, disability to sue.

CONTRACT (E) = (S) same; also obligation; meaning of terms, 431; division of contracts, 432; contracts by specialty, 433; simple contracts, 434; simple contracts, as distinguished from contracts under seal, 435; estoppel, 436; merger, 437; remedy for specialty debts, 438; consideration in contracts, 441; Statute of Frauds, 442; contracts as to real property, 443; other contracts, 444; to be performed in a year, 445; consideration must be in writing, 446; proof of mercantile letters, etc., 447; bond to pay money, 448; loan of money, 449; gift of money, 450; promise to pay money, 451; special agreement as to personalty, 453; mistake in contracts, 453; fraud, 455; constructive fraud, 456; duress, 457; maintenance and champerty, 458; wagers, 459; Sunday, 460; payment of money, 461; stamped receipt, 462; presumption of payment, 463; stranger paying a debt, 464; excuse for non-performance of contract, 465; tender of performance, 466; tender on day appointed, 467; tender of rent, 468; effect of tender on costs, 470; payment of money into court as defence, 471; release and discharge of contracts, 472; assignment of debts, 476; debts payable *in futuro*, 479; remedy for debts generally, 480; staking truth of cause on adversary's oath, 481; interest on contracts, 482; damages for breach of contract, 483; specific performance, 484; set off, 485; Statutes of Limitations as to actions, from what time statute runs, 493; disabilities, 494; acknowledgment of debt, 496.

——— OF MARRIAGE (S) = (E) marriage settlement, 922, 923.

——— UNDER SEAL (E) = (S) contract by deed, which, however, requires no seal, 435.

CONTRAVENTION (S) = (E) breach of a covenant, or condition, or statute.
CONTRIBUTION (in maritime laws) (S) = (E) same.
——— (E) = (S) relief among co-cautioners.
CONTUMACY (S) = (E) non-appearance.
CONVENTION OF ROYAL BURGHS (S) *i. e.*, meeting of delegates from burghs to consider their common welfare = (E) not known.
CONVENTIONAL OBLIGATION (S) = (E) contract.
CONVERSION (E) *i.e.*, turning to one's own use the goods of another. Refusal on demand is evidence of conversion, and is a good ground of action = (S) no term; appropriation.
CONVEYANCE OF MOVEABLES (S) = (E) assignment, bill of sale.
CONVEYANCES OF LAND, nature of, 356; conveyance of fee-simple, 356; feoffment, 357; livery of seisin, 358; lease and release, 360; form of modern conveyance, 361; technical words of conveyance, 361; receipt for purchase money, 362; possession under conveyance, 363; vendee's relation to vendor's lord, 364; different kinds of deeds, 365.
CONVICTION (E) *i. e.*, the term given to the decision of justices of the peace when convicting persons summarily = (S) seldom used; decree or sentence followed by summary warrant of imprisonment.
CONVOCATION (E) or ecclesiastical parliament = (S) General Assembly, 991.
CO-OBLIGANTS (S) = (E) same.
CO-OWNER (S) = (E) tenant in common, companion in tenancy in common, 156, 162, 170.
CO-PARCENERS (E) = (S) heirs-portioners, 164, 777. Eldest not entitled to mansion-house 166, 777; nor to custody of title-deeds, *ibid*; partition among, 165, 778.
COPARTNERY OR COPARTNERSHIP (S) = (E) same; also partnership.
COPY, CERTIFIED (E) = (S) extract.
——— EXAMINED (E) = (S) copy compared by a witness.
——— OFFICE (E) = (S) extract.
COPYHOLD, a kind of tenure (E) = (S) feudal tenure or feu-holding; nature of tenure, 16, 175; origin of copyholds, 173; nature of copyhold estate, 175; powers of copyholder, 176; customary freeholds, 177; variety of local customs, 178; rents, 179; reliefs, 180; heriots, 180; escheat, 182; fine on alienation, 183; alienation, 184; ceremony of surrender, 185; after surrender, but before admittance, 186; admittance, when, and its effects, 187; heir of copyholder before admittance, 188; if no heir or devisee appears, 189; alienation by will, 190; peculiarity of conveyancing, 192; dower and curtesy, 193; mortgage of, 194; estate tail in, 195; trusts of, 196; power of lord to alter tenure or customs, 197; subinfeudation, 198; lord of manor alienating, 199; enfranchisement of copyholds, 200.
COPYHOLDER (E) = (S) vassal.
COPYRIGHT, 590.
CORN, THIRLAGE OF (S) = (E) covenant or custom to send corn to grind at a particular mill, 290.
CORONER (E) *i.e.*, an officer appointed by the freeholders of the county to inquire with a jury into the cause and circumstances of all sudden deaths = (S) no such officer. *See* "Procurator Fiscal," 959.
———'s INQUEST (E) *i. e.*, trial before a coroner, the verdict being called an inquisition. *See* above.

CORPORATE NAME (E) *i. e.*, the name given to a corporation when erected, by which name it is to sue and be sued = (S) name of incorporation.

CORPORATIONS (E) = (S) same, also community; also incorporations; alienation to, 26; common seal, 649; license to hold lands, 651; ecclesiastical, 652.

CORPOREAL MOVEABLES (S) = (E) chattels corporeal.

CORPUS DELICTI (S) = (E) same.

CORREI CREDENDI (S) *i. e.*, those jointly entitled to a debt = (E) co-obligees or joint creditors.

——— DEBENDI (S) *i. e.*, jointly bound = (E) co-obligors or joint debtors.

CORROBORATION, BOND OF (S) = (E) Bond given as further or collateral security.

COSTS (E) = (S) expenses.

——— OF INCREASE (E) *i. e.*, the increased costs at C. L., beyond a nominal sum of forty shillings, which is always entered on the postea, and which increased costs are verified by an affidavit of increase, and are taxed by the master = (S) not used.

——— on mortgage, 116, 1226; costs on sale of land, 326, 1226; in House of Lords, 1046; at Common Law, 1119; solicitor's lien for, 1223, 1227; taxation of, 1222.

COUNCIL AND SESSION (S) *i. e.*, the Judges of the Court of Session are named in petitions, summonses, etc., Lords of Council and Session = (E) not used.

COUNSEL (E) = (S) same; degrees of, 1209, *et seq.*

COUNTERMAND (E) notice of, *i. e.*, where a party after giving notice of trial wishes to withdraw the notice, he may do so by countermanding notice = (S) not used.

COUNTERPART (E) = (S) duplicate.

COUNT AND RECKONING (S) action of = (E) suit for an account. An action of account lies at C. L., but is seldom used; but to file a bill, or commence a suit for an account, is, in Ch., the common remedy, 1150.

COUNTY COURTS (E) = (S) sheriff courts; also small debt courts.

——— outline of proceedings, 1166.

——— PALATINE (E) *i. e.*, the counties of Durham and Lancaster are so called, because vested in the Crown by a separate title, and there are local courts in the county, and formerly writs issuing out of the common law courts used to be encumbered with additional forms when issued into these counties = (S) not known.

COURT OF SESSION (S) *i. e.*, the superior court of law and equity, also of divorce and admiralty, having universal jurisdiction, except in crimes. Subdivided into Outer House and Inner House, and the latter into First and Second Divisions, 1052, 1055.

——— ROLL (E) in copyhold estates, 173, 184.

COURTESY OR CURIALITY (S) = (E) curtesy; husband is called in (E) tenant of the curtesy in the lands, etc. = (S) courtesy holder, 901.

COVENANT (E) *i. e.*, a writing under seal of the party binding the party to do something = (S) not used; agreement or obligation by deed.

——— (E) *i. e.*, specific parts of a deed whereby the covenantor binds himself to do certain things = (S) clause or obligation, 361.

———, ACTION OF (E) *i. e.*, action for breach of contract under seal = (S) no special name; action of damages, 1059.

——— OF QUIET ENJOYMENT (E) = (S) included in clause of warrandice.

COVENANT OF RIGHT TO CONVEY (E) = (S) included in clause of warrandice.

COVENANTS entered into by purchaser of land, (E) = (S) conditions in feu-charter, 79; liability on, 84.

COVERTURE (E) the condition of a married woman or feme covert = (S) marriage.

COVIN (E) *i. e.*, secret conspiracy or agreement to injure another = (S) fraud and circumvention.

CREDIT, LETTER OF (S) *i. e.*, bill by one banker on another in favour of third party = (E) the same.

CREDITOR'S SUIT (E) *i. e.*, a bill or claim filed by a creditor of a deceased person for himself and other creditors, to have the estate (both real and personal) administered, and the debts paid = (S) action of ranking and sale, which applies to heritable estate; action of adjudication; action of count and reckoning; action of multiplepoinding; also sequestration of a deceased person's estate is competent, 791, 1177.

CREDULITY, OATH OF (S) *i. e.*, oath administered to test whether there is a good ground of action or defence = (E) not known, 1106.

CRIER of causes (S) = (E) usher of court.

CRIME (S) = (E) not used technically, but in a loose sense generally confined to treasons and felonies, and exclusive of misdemeanours.

——— jurisdiction of criminal courts, 940; civil remedy for crime how far barred, 941; new trial in criminal cases, 943; public prosecutor, 944; limitation of prosecution of crimes, 949; classification of crimes, 950; the preliminary charge before the magistrate, 951; interrogating prisoner, 952; proceedings before magistrate, 953; grand jury, 957; without going before magistrate, 958; forcing on trial, 960; indictment, 961; prisoner's notice of indictment, 962; the trial, 965; poor prisoner's right to counsel, 966; arraignment, 967; jury, 969; prisoner's statement in evidence, 970; accomplice's evidence, 973; infant a witness, 974; objection to witness, 975; compelling witness's attendance, 976; order of proceeding at trial, 977; witness swearing, etc., 979; discrediting witness, 983; verdict of jury, 984; dying declarations, 985; hearsay evidence of dead witness, 986; rape, 987; attempt to commit felony or misdemeanour, 989.

CRIMINAL CONVERSATION, (E) or CRIM. CON., action of, now abolished, and a petition for damages against adulterer substituted = (S) action for seduction of a wife, which may be raised before or after divorce, 513, 870.

——— INFORMATION (E) *i. e.*, a mode of proceeding against a party for a misdemeanour without indictment or presentment by a grand jury. The information is either filed by the Attorney-General *ex officio*, or by the master of the Crown Office = (S) criminal letters, 959.

——— LETTERS (S) *i. e.*, a mode of commencing a criminal process otherwise than by indictment. It is in form a summons issued by the Lord Advocate, or his deputes = (E) criminal information, which is competent for misdemeanours only, 959.

CROP, LANDLORD'S HYPOTHEC OVER, (S) = (E) landlord's power to distrain, 409.

——— WAYGOING (S) = (E) awaygoing crops.

CROPPING (S) = (E) rotation of crops.

CROSS REMAINDERS (E) *i. e.*, where, in estates given to two or more persons and on death of one, there is a remainder to the issue of the other = (S) not used.

CROWN AGENT (S) *i. e.*, the agent or solicitor who, by arrangement with the Lord Advocate as public prosecutor, expedes indictments and criminal letters = (E) no officer for these general purposes; but solicitor for the Treasury acts in a like capacity; also the master of the Crown Office in some cases.

——— CHARTER (S) *i. e.*, a charter from the Crown as superior of the lands in Scotland to the Crown vassals = (E) not known and not needed.

——— DEBTS, priority of in case of death of debtor, 688.

——— OFFICE (E) *i. e.*, a department of the Court of Queen's Bench, where criminal and *quasi* criminal writs and proceedings are filed = (S) Crown agent's office.

——— PLEAS OF THE (S) *i. e.*, murder, robbery, rape, wilful fire-raising = (E) formerly the same terms were used.

——— RIGHT OF, to land generally in (E) 1, 13, 18, 20. All owners are vassals of, in (S), 18, 20. Right to wreck, 4; to swans, 5. Right of to highway in (S), 12.

CULPA (S) = (E) negligence; also laches.

——— LATA (S) *i. e.*, gross neglect.

——— LEVIS (S) = (E) (seldom used), such negligence as a person might shew in his own affairs.

——— LEVISSIMA (S) *i. e.*, ordinary neglect.

CULPABLE HOMICIDE (S) = (E) manslaughter.

CULTIVATION AND MANAGEMENT OF FARM (E) = (S) same, 392.

CUMULO FEU-DUTY (S) = (E) in leaseholds like chief ground-rent; in freeholds not known.

CUMULATIVE LEGACIES (S) = (E) accumulative legacies.

CURATE (E) *i. e.*, the lowest degree in the church, assisting rectors and vicars = (S) not known.

CURATOR TO A MINOR (S) = (E) guardian, 819; actions against, 814.

——— TO AN IDIOT (S) = (E) committee, 800.

——— AD LITEM (S) = (E) guardian *ad litem.*

——— BONIS (S) = (E) receiver or trustee appointed by court; also committee of lunatic, 800.

CURATORIAL POWER of husband over wife (S) = (E) not used; marital right.

CURIA ADVISARI VULT (E) a term in legal reports showing that the court took time to consider the judgment = (S) not used, avizandum.

CURIALITAS (S) old name for courtesy = (E) curtesy.

CURRENTE TERMINO (S) = (E) during the term.

CURSING AND BEATING OF PARENTS (S) *i. e.*, by children above 16 is a transportable offence; *R.* v. *Beatson*, 1 Swint. 254 = (E) no term, and not known as distinct crime; included under assault or aggravated assault.

CURSITORS (E) certain clerks in the Court of Chancery who make out original writs = (S) not used.

CURTESY OF ENGLAND (E) *i. e.*, an estate of freehold which a husband surviving his wife who was seised in fee or fee tail, has in her lands = (S) courtesy, 901.

CURTILAGE (E) court or yard behind a dwelling-house = (S) not used; included in "parts, pertinents, and pendicles."

CUSTODY of Deeds on mortgage, 99; of child, 843; of a bastard, 849; of pupil = (E) custody of infant, 843, 844, 852.

CUSTOM (E) *i. e.*, an unwritten law established by long usage, and which

supersedes the common or universal law in particular localities, as the custom of London, of borough English, etc. = (S) scarcely known, except in mercantile matters.

CUSTOMARY FREEHOLDS (E) *i. e.*, a variation of copyhold tenure = (S) feudal tenure, 177. See "Copyhold," "Feu."

CUSTOMS of copyhold tenure (E) = (S) incidents or casualties of superiority, 178.

CUSTOS ROTULORUM (E) *i. e.*, the chief civil officer of the county, whose deputy is the clerk of the peace = (S) subdivided among sheriff-clerk and clerk of the peace, and keeper of register.

CY PRÈS (E) a doctrine whereby a court gives a construction of wills, as near as the rules of law will permit to what was intended = (S) no term, 150.

DAM (S) *i. e.*, a boundary or confinement = (E) same.

DAMAGE feasant or faisant (E) *i. e.*, if cattle are found trespassing on land of a tenant or owner, he can impound them, *i. e.*, shut them up or take them to the public pound, where they can be detained till the damage is paid for = (S) poinding of stray cattle, which may also be done *brevi manu*, 417.

DAMAGES (S) = (E) same; for breach of contract, 483; for torts, 510.

DAMNOSA HÆREDITAS (S) = (E) same, seldom used; an estate of a deceased person burdened with debts.

DAMNUM FATALE (S) = (E) act of God, as a flood or tempest.

DARREIN CONTINUANCE plea of *puis*, (E) = (S) *res noviter veniens ad notitiam*, 1081.

DATE of deeds, 340.

DATIVE (S) as executor-dative = (E) administrator.

DAY-RULE OR DAY WRIT (E) *i. e.*, a permission for a prisoner to go out of prison for a day = (S) not used.

DAYS OF GRACE (S) = (E) same.

DEACON (E) *i. e.*, a minister of the church whose office is to assist the priest in divine service. He may perform any divine office except pronounce the absolution, and consecrate the sacrament = (S) not known; a deacon in church affairs is an officer who attends to the temporal affairs of the church. Deacons of crafts before the Burgh Reform Act formed part of the town council in royal burghs.

DEADLY, WARRANDICE AGAINST ALL (S) = (E) general warranty.

——— WEAPON (E) = (S) lethal weapon.

DEADMAN'S PART (E) *i. e.*, that part of a man's personal estate which he could by the old custom of London bequeath, now abolished = (S) dead's part, which is still the common law, 848, 902.

DEAD'S PART (S) *i. e.*, that part of a man's moveable property which he can leave by will = (E) not known, for there is no restriction, but a similar restriction formerly existed by special custom in city of London, York, etc. In London it was called the Legatory or dead man's share, now abolished, 674, 848, 902.

DEAN OF FACULTY (S) *i. e.*, advocate elected as leader by his brethren = (E) not known; the bar does not elect a titular leader.

——— OF GUILD (S) *i. e.*, a member of council in burghs who has jurisdiction to condemn ruinous buildings, and to settle questions of disputed

boundary = (E) not known; but in London, by statute, surveyors are appointed to condemn buildings.

DEATHBED, DECLARATION ON (E) *i. e.*, statement by a person on deathbed, who has been fatally wounded by another as to the circumstances, more frequently called dying declaration = (S) deathbed declaration.

——— LAW OF (S) *i. e.*, a rule making void all dispositions of heritable property to strangers made on deathbed, or sixty days before death = (E) not known, 675; may be rebutted by proof of going to kirk or market, 675.

DEBATE (S) = argument (E). In arguing a case the senior counsel begins, and junior follows in E; *contra* in S.

DE BENE ESSE (E) a bill or motion in Chancery to take testimony of witnesses *de bene esse*, who may die before a trial at law, or where he is a sole witness = (S) commission to take deposition of witness to lie *in retentis*.

DEBITUM FUNDI (S) = (E) a charge on land, 180, 183.

DEBT, ACTION OF (E) *i. e.*, to recover a debt due by simple contract = (S) not used; action to recover debt, 1058.

DEBTS (S) = (E) same sense; debts due *to me* are also technically called "choses in action;" assignment of, 478; remedy for generally, 480; priority of, 432, 688; of deceased person, 688, 689, 781, 792.

DECEIT (E) action of, *i. e.*, an action on the case to recover damages for injury caused by a wilfully false representation = (S) action for reparation on the ground of fraud or circumvention, etc.

DECEM TALES (E) *i. e.*, a term for a writ authorizing additional jurymen to be summoned since sufficient did not appear = (S) not used.

DECERN (S) *i. e.*, an essential word in all decrees or interlocutors, and which warrants execution. The interlocutor ends with the words, "and decern" = (E) to pronounce final decree in Ch.; to give judgment for a party at C. L.

DECIMÆ VICARIÆ (S) *i. e.*, vicarage tithes = (E) tithes.

DECISIONS (S) = (E) reports of cases.

DECISIVE OATH (E) used only in civil law = (S) oath of reference.

DECLARANT (S) *i. e.*, a person or party stating something not on oath = (E) no term; all declarations must in general be on oath, and then called affidavits or depositions as the case may be.

DECLARATION (E) the plaintiff's first pleading in an action at C. L., setting out the cause of action = (S) summons and condescendence, which are united, 1072.

——— (in criminal proceedings) (S) = (E) the prisoner's statement before the magistrate, 952, 970.

———, DYING OR DEATH-BED (S) = (E) same.

——— JUDICIAL (S) = (E) in Ch. examination of party, with a view to discovery; at C. L. examination by interrogatories or orally.

DECLARATOR, ACTION OF (S) = (E) no such general form of action or suit; but in Ch. similar suits are now allowed, though formerly prohibited, unless praying for other relief. They have no special name. There is also a petition in the Divorce Court for declaration of legitimacy, or other personal status, 1058.

DECLINATURE (S) *i. e.*, a preliminary plea objecting to the jurisdiction, on the ground that the judge is interested in the suit = (E) plea to the jurisdiction on the ground of interest.

DECREE (E) *i. e.*, a final judgment of a court of equity = (S) decree, or more usually interlocutor.

——— DATIVE (S) = (E) order of Court of Probate appointing an administrator.

——— IN ABSENCE (S) = (E) judgment by default at C. L; decree *pro confesso* in Ch.

——— OF LOCALITY (S) a decree of the Teind Court allocating stipend upon different heritors = (E) not used; apportionment of tithe rent-charge.

——— OF MODIFICATION (S) decree of Teind Court modifying or fixing stipend = (E) not known.

——— OF REGISTRATION (S) *i. e.*, a decree obtained without any action, for payment of money secured by a bond or deed, which contains a clause of registration. *See* "Registration, Decree of" = (E) not known, but judgment may be had by entering it up on a warrant of attorney, cognovit, or consent to a judge's order, 448, 1117.

——— OR DECREET (S) = (E) final decree in Ch.; final judgment at C. L.

DECREET ARBITRAL OR AWARD (S) = (E) award, 1201.

——— CONFORM (S) *i. e.*, a decree of the Court of Session following on a decree of the Sheriff Court, so as to enable execution or diligence against the person to be added = (E) certiorari to remove a cause from an inferior court, for the purpose of issuing execution out of a superior court.

DEDICATION OF LAND TO THE PUBLIC, 313.

DEED (E), what, 331; deed-poll, 332; indenture, 333; signature, 335; sealing, 336; delivery, 338; date of deed, 340; witnesses to deed, 341, 342; attestation clause, 344; when attestation clause engrossed, 345; partly written and partly printed, 346; where party cannot write, 347; interlineations, erasures, and alterations, 348; paying of deed, 349; signing each page, 350; holograph deeds, 351; debts secured by deed, 352; proving a deed, 353; notary authenticating deed, 354; setting up nullity of deed, 355.

——— (S) = (E) the same; also indenture, if between two or more parties, 331, *et seq.* Deeds in (E) must be sealed. Under that name are never included wills or devises which are equivalent to a disposition and settlement in (S).

——— (S); written bookwise, 333; signature, 335; delivery, 338; date of deed, 340; witnesses, 341; testing clause, 344; where party cannot write, 347; interlineations, etc., 348; pagination, 349; holograph deed, 351; probative nature, 353; notary, 354; reduction of, 355.

DEEDPOLL (E) *i. e.*, deed which requires one party to execute it = (S) not used; a deed granted by one party as a charter, bond, etc.

DEFAULT, JUDGMENT BY (E) at C. L. = (S) decree in absence, 1071.

DEFEASANCE (E) *i. e.*, the condition on which a bond, warrant of attorney, or cognovit, will become void = (S) not used; performance of obligation.

DEFENCES, THE (S) *i. e.*, the pleading of the defender = (E) not used technically, the plea or the demurrer, as the case may be, at C. L. 1073. In Ch. the demurrer, the plea, or the answer (as the case may be), 1154.

——— DILATORY (S) *i. e.*, preliminary defence. *See* Defence Preliminary.

DEFENCES, PEREMPTORY (S) = (E) pleas in bar, also traverse, or confession and avoidance at C. L. 1073. In Ch. demurrer, plea, or answer, according to circumstances, 1154.

——— PRELIMINARY (S) = (E) pleas in abatement, and one or two other pleas preliminary, at C. L. 1073; and in Ch. demurrer as for want of parties, for want of equity; of jurisdiction, etc. 1154.

DEFENDANT (E) *i. e.*, either in a civil action or suit at C. L. or in Ch.; also in prosecution for misdemeanour = (S) defender in civil action; panel in criminal causes.

DEFENDER (S) = (E) defendant, both at C. L. and Ch.

DEFENDING FORCIBLY (S) = (E) obstruction or resistance to officers of justice.

DEFORCEMENT (S) = (E) assault of a bailiff or peace-officer in the execution of his duty.

——— (E) *i. e.*, unlawfully holding possession of lands to which another has a right = (S) not used; *mala fide* possession.

DEFRAUDING CREDITORS (S) = (E) fraudulent conveyances by debtors; also offences against the Bankrupt Act.

DEFUNCT (S) = (E) deceased.

DEGRADATION (E) of a clergyman = (S) deposition.

DE INJURIA, TRAVERSE (E) *i. e.*, a term used for a pleading in answer to another, which had set up an excuse for doing some act, that the party did it of his own wrong = (S) not used.

DELAY OR MORA (S) = (E) laches.

DELECTUS PERSONÆ (S) = (E) seldom used; *i. e.*, choice of the individual for some personal qualification.

DELEGATED JURISDICTION (S) = (E) jurisdiction by consent.

DELEGATION (S) *i. e.*, extinguishment of a debt by substituting one debtor for another, with consent, and discharging the first debtor = (E) seldom used, new contract, transfer of a debt, and substitution of a debtor, which may be done in certain cases, so as to enable the transferee to sue the original debtor in an action for money had and received.

DELETE (S) = (E) to erase, expunge.

DELETION IN WRITS (S) = (E) erasure, expunging words.

DELIBERANDI, ANNUS (S) *i. e.*, the year to which an heir is entitled to consider whether he will be served heir, and enter into the lands, etc., of his ancestor = (E) not known, and not needed, 779.

DELICT AND DELINQUENCY (S) = (E) a public indictable offence or crime.

——— QUASI (S) = (E) torts or matters *ex delicto*, 506; reparation for, 510; solatium, 511; assythment, 511.

DELIVERY (S) = (E) same; of goods sold, 521, 525; of deeds, 338.

DE LUNATICO INQUIRENDO, COMMISSION (E) = (S) brieve of furiosity, 800.

DEMAND (E) = (S) a desiring and requiring, or requisition.

DEMANDANT (E) *i. e.*, a plaintiff in a real action = (S) pursuer.

DE MEDIETATE LINGUÆ OR JURY (E) *i. e.*, a jury half composed of foreigners which a foreigner on trial for crime can demand = (S) not known, and not competent, 969.

DEMEMBRATION (S) = (E) mayhem or maihem, now seldom used, classed under wounding, stabbing, shooting, etc., with intent to maim.

DEMISE (E) = (S) lease.

DEMISSION of a clergyman (S) = (E) resignation.

DEMONSTRATIVE LEGACY (E) *i. e.*, payable out of a particular fund = (S) included in special legacy, 699.

DEMURRER (E) *i. e.*, at C. L. a pleading admitting the fact, but denying the inference of law therefrom, 1078; in Ch. a defence on the ground of want of parties, want of equity, etc. 1154 = (S) plea or objection to the relevancy, 1078.

——— BOOK (E) *i. e.*, copy of the record up to the point of demurrer, for the use of the judges who hear the case argued = (S) not used; record closed on a plea to the relevancy, 1078.

DENIAL IN PLEADING (E) at C. L. an allegation of fact, if material and not confessed, must be specially traversed = (S) not technical.

DE NOVO, TRIAL (E) formerly called a *venire de novo*, *i. e.*, a new trial granted on account of some defect on the face of the record = (S) the same, though called merely new trial.

DENUNCIATION (obsolete) (S) = (E) like commission of rebellion in Ch., or proclamation of outlawry at C. L.

DEODAND (E) *i. e.*, a fine set upon a person inadvertently causing fatal accident, now abolished by 9 & 10 Vic. c. 62 = (S) not known.

DEPARTURE (E) *i. e.*, where a party in his last pleading takes up different ground from that in his former pleading = (S) not used; variation.

DEPENDING ACTION (S) *i. e.*, an action is said to be depending only from the moment of the citation (service E) = (E) date of action, which is from the day on which the writ of summons issues, which may be days and months before service.

——— (S) = (E) pending action or suit.

DEPONE, TO (S) = (E) to depose.

DEPONENT (E) *i. e.*, person making affidavit = (S) the same; one whose evidence is taken down in writing.

DEPOSIT, as to extraordinary expenses of depositary, 604.

——— OF TITLE DEEDS is an equitable mortgage in (E), *contra* in (S) 123.

DEPOSITATION OR DEPOSIT (S) = (E) included under simple bailment.

DEPOSITION (S) *i. e.*, the testimony of any witness in civil or criminal cases whose testimony is taken down in writing = (E) same, but confined to the written examination of a witness in criminal cases on oath, as taken down in presence of a magistrate previous to the prisoner being committed for trial, and signed by the deponent or witness, and by the magistrate, 981.

——— of a clergyman (S) = (E) deprivation.

DEPREDATION OR HERSHIP (S) *i. e.*, the driving off cattle with the masterful force of armed persons = (E) stealing cattle, sheep, etc., as the case may be.

DE RATIONABILI BONORUM PARTE (E) *i. e.*, the old writ whereby a wife or child sued for a share of the husband or father's goods = (S) action for *jus relictæ* or *legitim*, as the case may be.

DERELICT (E) = (S) what is abandoned by the owner.

DERELICTION (S) = (E) act of making a derelict.

DESCENT (E) = (S) heritable succession *ab intestato*; heir-at-law's legitimacy, 751; heir presumptive, 752; heir apparent, 753; from what stock traced, 755; order of descendants, 756; middle brother purchasing land, 758; father, 759; order of succession after father, 760; brother, 761; half-blood, 762; table of descent, 763; one of line attainted,

764; devise to heir-at-law, 765; of estate tail, 766; coparceners, 777; vesting of realty, 779; heir's liability for debts, 781; exoneration of real estate, 785; order of applying assets, 789; creditor's remedy against estate of deceased, 791; administration in Chancery, 792.

DESCENT, TABLE OF, 763.

DESERTION of married persons (S) = (E) same; at C. L. desertion by wife is generally called "leaving her husband without just cause;" divorce for, 875; judicial separation for, 878.

——— by tenant (S) = (E) vacant possession.

——— of the diet (S) = (E) if the attorney-general prosecutes, "a *nolle prosequi*;" if not, "quashing the indictment," 947.

DESIGNATION (S) = (E) no general term, but includes addition, *i. e.*, the trade or calling, and also the place of abode or residence; of witnesses to deeds, 341.

——— of manse and glebe (S) *i.e.*, selection of lands by presbytery = (E) not known, 1013.

DE SON TORT, Executor (E) = (S) vitious intromitter, 695.

DESTINATION (S) = (E) limitation in grants of estates; of the fee, 23; in entails, 30; simple destination, 36; with clause of return, 37; with prohibition not to alienate, 38; of conjunct rights, 172; of fee in dispositions, 721; in marriage contracts, 928.

——— CLAUSE OF, in deeds (S) = (E) habendum, 361.

DESUETUDE (S). An Act of Parliament passed before the Union, may be impliedly repealed by desuetude without any express repeal. See Report of Lords of Session to House of Lords, 27th Feb. 1810 = (E) seldom used; nonuser. An Act of Parliament cannot be repealed by desuetude.

DETAINER (E) = (S) detaining.

DETAINING CREDITOR (E) = (S) incarcerator, or incarcerating creditor.

DETINUE, ACTION OF (E) = (S) action of damages for detaining goods, 1058.

DEVASTAVIT (E) *i. e.*, a misappropriation of assets, or misapplication, or other tortious act as to assets = (S) not used, 696.

DEVISE (E) (*i. e.*, will of lands) = (S) *mortis causa* disposition or settlement, 719; of estate tail, 720; lapse by death of devisee, 722; executory devise, 729.

DEVISEE (E) = (S) disponee *mortis causa*.

DEVISOR (E) *i.e.*, testator who devises land = (S) disponer *mortis causa*.

DEVOLUTION (S) = (E) not used as to a reference to arbitrators and an umpire.

——— CLAUSE OF (S) (in destination of an entail) = (E) a gift over (in a limitation).

DIES CEDIT (S) *i. e.*, date when the debt is contracted = (E) date or commencement of contract.

——— VENIT (S) *i. e.*, date when the debt is payable = (E) day of payment or performance.

DIET OF COMPEARANCE (S) = (E) time for appearance.

——— OF COURT (S) = (E) sitting.

DILATORY DEFENCE (S) or dilatory plea = (E) subdivided into pleas in abatement, plea to the jurisdiction, etc. 1073.

DILECTUS PERSONÆ (S) = (E) no term; something personal to the contractor.

DILIGENCE, *i. e.*, generally (S) = (E) process.
——— (S) (*i. e.*, on a decree) = (E) execution; "execution issues against, or is levied upon."
——— AGAINST THE HERITAGE, or adjudication (S) = (E) writ of execution, called elegit. *See* "Adjudication" and "Poinding."
——— AGAINST THE MOVEABLES, or poinding (S) = (E) writ of execution, called fi. fa. *See* "Poinding."
——— AGAINST THE PERSON (S) = (E) writ of execution, called ca. sa. In Ch. the same, also attachment for contempt.
——— AGAINST WITNESSES (S) = (E) subpœna.
——— INCIDENT (S) *i. e.*, diligence to cite witnesses and examine havers = (E) no general term—subpœna for witnesses, and rule or order for examination of parties, and for interrogatories.
——— PRESTABLE (S) = (E) doctrine of degrees of diligence in keeping other persons' property. *See* "Culpa."
——— SECOND (S) letters of, *i. e.*, after a first diligence, or citation of a witness, if he has disobeyed, a second diligence will be issued, containing a warrant to apprehend the witness, and bring him before the court or commissioner = (E) not known, but attachment for contempt is competent, if a subpœna is disobeyed, 1090.
——— SUMMARY (S) = (E) like execution on a warrant of attorney, cognovit, or judge's order, at C. L., or privileged action on bill of exchange.
——— TO EXAMINE HAVERS = (E) in Ch. "a bill for a discovery;" at C. L. rule to compel oral examination, or a subpœna duces tecum, 1083.
DIOCESE OR DIOCESS (E) *i. e.*, the jurisdiction of a bishop = (S) not known, presbytery.
DISABILITY (E) to sue = (S) *non valentia*, i. e., *contra non valentem currit præscriptio*, 301, 494.
DISBAR (E) *i. e.*, to expel a barrister-at-law from the bar and the liberty of practising, which power is vested in each Inn of Court, subject to an appeal to the judges = (S) to deprive an advocate.
DISCHARGE (S) = (E) same; also receipt, release.
——— OF A BANKRUPT (S) = (E) same; also certificate, 1180.
——— OF CONTRACTS (S) = (E) extinguishment, 476; receipt, stamped, 462; of bills of exchange, 563.
DISCLAIMER (E) *i. e.*, one mode of defence in Ch. = (S) renouncing title or interest in subject matter of a suit, called disclamation of process.
——— (E) *i. e.*, where an executor or trustee, before acting under the will or trust, disclaims the office or trust, and declines to act = (S) renunciation, 219.
——— (E) *i. e.*, a renunciation or denial of landlord's title by a tenant = (S) no term, but like disclamation by a vassal of his superior's title.
——— (E) *i. e.*, where a defendant in a suit in equity disclaims or renounces all claim to the subject matter of the suit, he can put in a disclaimer = (S) disclamation of process.
DISCLAMATION by Vassal (S) = (E) denial of title, as by tenant.
DISCONFORM (S) = (E) not in pursuance of, varying from.
DISCONTIGUOUS LANDS (S) *i. e.*, lands lying apart from each other, which formerly required sasine to be given in a particular way = (E) not used, no seisin being in general required.
DISCONTINUANCE (E) at C. L.; a plaintiff, when he finds he cannot sustain his

action may discontinue it, with or without leave, according to the stage of the action. He obtains a rule to discontinue, which must be, in general, on payment of costs = (S) abandonment of action.

DISCOVERT (E) *i. e.*, a widow, when the marriage is at an end = (S) unmarried.

DISCOVERY (E) *i. e.*, the knowledge obtained by one party in a suit of material facts and documents in the knowledge or possession of his opponent = (S) exhibition; deposition of haver.

——— BILL FOR A (E) in Ch. = (S) action of exhibition, when the action is by a proprietor or heir, who wants to deliberate. But the knowledge required may also be obtained in any suit by means of a diligence to cite and examine witnesses and havers, 1082, 1100, 1102.

——— RULE FOR A (E) at C. L. = (S) diligence to cite and examine havers, 1082, 1100.

DISCUSSION (S) of heirs who are primarily liable for debts of ancestor, before applying to heirs who are secondarily liable = (E) exoneration of the real estate, 785.

——— (S) of principals before applying to cautioners = (E) suing and issuing execution against principal, which, however, is not necessary, 626.

DISENTAIL (S) = (E) same; also bar the estate tail; consent of next heirs required, when, 34, 35.

DISHABILITATION (S) old term = (E) corruption of blood.

DISJUNCTION OF PARISHES (S) = (E) division of parishes.

DISMISSION OF BILL (E) in Court of Ch. = (S) if on the merits, interlocutor assoilzieing the defender; if not on merits, interlocutor sustaining the defence, or repelling the pleas of the pursuer.

DISPAUPER (E) *i. e.*, where a person has sued *in forma pauperis*, and during suit the court, either on the ground of property, or otherwise, takes away this privilege, the court is said to dispauper him = (S) not used, deprive a person of the benefit of the poor's roll.

DISPENSATION, CLAUSE OF (S) *i. e.*, a clause authorizing sasine to be taken of discontiguous lands at one place = (E) not known, and not needed.

DISPONE (S) *i. e.*, a technical word essential to the conveyance of heritable property, and for which no equivalent is accepted, however clear may be the meaning of the party = (E) convey, or grant, or assign; but equivalent words are accepted, 361, 718.

DISPONER AND DISPONEE (S) = (E) no general term; vendor and vendee; devisor and devisee.

DISPOSITION (S) = (E) conveyance as to real estate; assignment as to personalty.

——— AND SETTLEMENT (S) which must be by way of deed = (E) will or devise, 661.

——— IN SECURITY (S) generally called bond and disposition in security = (E) mortgage, 89.

DISPOSITIVE CLAUSE (S) in a deed = (E) the parts called testatum, parcels, and habendum, 361.

DISPUNISHABLE FOR WASTE (E) *i. e.*, not liable for committing waste = (S) not used; not liable for damage done to fiar's property, 66.

DISSEISIN (E) old term for wrongful ouster of a party from possession of his freehold = (S) ejection and intrusion.

DISSEISOR (E) *i. e.*, one who disseised another = (S) one guilty of ejection and intrusion.

DISSOLVING AN INJUNCTION (E) = (S) recalling an interdict.

DISTRAIN, TO (E) *i. e.*, to levy rent due by seizing and selling the goods of the tenant = (S) to sequestrate or enforce the hypothec as regards landlord, 406; to poind the ground, as regards real creditor, 107, 263, 273.

——— (E) an owner may also distrain cattle damage feasant = (S) poind stray cattle.

DISTRESS (E) = (S) landlord's sequestration, also poinding of the ground; by landlord, 406, *et seq.*

——— DOUBLE. *See* "Double Distress."

——— FOR RATES (E) *i. e.*, the mode by which rates are levied and payment enforced against persons who refuse or fail to pay = (S) sometimes used; enforcing payment.

DISTRIBUTION, faculty of, among children, by a parent who has a liferent (S) = (E) power of appointment, 292.

DISTRIBUTIONS, STATUTE OF (E) *i. e.*, the statute 22 and 23 Ch. II. c. 10, explained by 29 Ch. II. c. 3, under which the widow and next of kin of a deceased person dying intestate are entitled to certain shares of the personalty = (S) similar and higher rights exist at common law, 734, 738, 748, 848.

DISTRIBUTIVE ISSUES (E) in pleading, where the issues are capable of being distributed or separated into distinct parts, the validity of the pleading and verdict, and also the costs, are affected = (S) not used.

DISTRINGAS (E) mode of compelling a defendant to appear by seizing his goods, now abolished, also mode of compelling a defendant at C. L. to deliver up goods in detinue = (S) not known, and not needed.

DISTURBANCE (E) *i.e.*, the wrongful obstruction of the owner of an incorporeal hereditament in its exercise or enjoyment as a right of way or ferry = (S) not used; molestation.

DITTAY (S) *i. e.*, criminal charge, now seldom used = (E) indictment.

DIVISIBLE FUND (S) *i. e.*, fund for division = (E) fund under administration in Ch. or Bankruptcy.

DIVISION, BENEFIT OF (S) = (E) contribution, 626.

——— BRIEVE OF (S) by heirs portioners, which is a writ issuing out of Chancery = (E) bill for partition by coparceners which may be filed in C. of Ch. 164, 777.

——— of commonty, or common property (S) = (E) partition of joint property, 160, 166.

——— SCHEME OF (S) = (E) mode of apportionment of a fund or estate among claimants.

DIVORCE (S) right of wife to, in what cases, 872; desertion, 875; right of husband to, 876; divorced party marrying adulterer, 867.

——— A MENSA ET TORO (E) now called judicial separation = (S) judicial separation, 878.

DOCQUET (S) in notarial instruments the part at the foot of the instrument on which the notary sets forth his name and authority, etc., is called the docquet = (E) memorandum. In proceedings in bankruptcy it was formerly used to denote an entry of petition for fiat of bankruptcy made by the secretary of bankrupts.

Doctors' Commons (E) the locality where the Ecclesiastical Courts were formerly, and some of which are still held in London; the College of Doctors of the Civil Law is also there situated. The Court of Probate and Divorce now sits in Westminster Hall. But the Bishops' Court, from which marriage licenses are obtained, is still situated there, and also the register for wills.

Dole (S) *i. e.*, the corrupt and evil intent essential to the guilt of a crime. A person is said to be *doli capax*, or *doli incapax* = (E) felonious intent, or guilty intent.

Dolus Malus (S). That kind of dexterity which is legitimate in bargains, is called sometimes *dolus bonus* = (E) fraud or deceit.

Domicile (E) = (S) the same, 1289.

Dominant Tenement (S) = (E) sometimes used; estate enjoying easement over another.

Dominium Directum (S) = (E) manorial right or seignory, 173, 256.

Dominus Litis (S) = (E) same.

——— Utile (S) = (E) copyhold estate; in freehold there is no splitting of the fee-simple, subinfeudation being prohibited, 18, 173, 176.

Donatio Inter Virum et Uxorem (S) = (E) not known, unless under a marriage settlement, 679, 872.

——— Mortis Causa (S) = (E) same, 679.

——— Propter Nuptias (S) *i. e.*, provision granted by husband to wife = (E) provisions in settlement, 923.

Donatory (S). The term is generally confined to the Crown's donatory, or the person to whom the Crown grants the estate of an intestate, which is escheated = (E) donee.

Doom (S) (obsolete) = (E) not technical.

Doors, Letters of Open (S) *i. e.*, an authority granted by a civil court where goods are poinded, and some are in lockfast places. It authorizes the messenger-at-arms to break open the outer door of the debtor's house = (E) not known, and no civil court can authorize a sheriff to break open the outer door in executing a *fi. fa.* or *ca. sa.* 1127, 1131.

Doquet (S) *see* "Docquet."

Dos (S) or tocher to a wife on her marriage = (E) portion or marriage portion.

Double Costs (E) in some actions formerly double and treble costs were allowed to certain parties suing; abolished in most cases = (S) not known.

——— Distress (S) *i. e.*, where arrestments are used by two or more creditors in order to attach the funds of their debtor in the hands of a third party; the arrestee, thus subject to double distress, can raise an action of multiplepoinding = (E) circumstances giving rise to claim of interpleader; though funds cannot, except in the city of London, and some other places, be attached before final judgment, a party may bring the competitors into the field by a bill of interpleader or an administration suit in Ch., or in certain select cases by a rule of interpleader at C. L. 690, 790.

——— Pleading (E). It is allowed in certain circumstances to state more than two inconsistent grounds in pleadings, but the costs may be affected = (S) there is no restriction.

——— Rent (E) *i. e.*, a tenant who has given notice to quit, and yet holds over, is liable to pay double rent thereafter = (S) not known.

DOUBLE OF A SUMMONS (S) = (E) copy of a summons.
DOWABLE (E) *i. e.*, entitled to dower = (S) not used, entitled to terce.
DOWER (E) = (S) terce, 907.
DOWERESS (E) = (S) tercer.
DRAINAGE by tenants for life, heirs of entail, etc., 67.
DRAWBACK, TO (S) = (E) relate back to; thus legitimation draws back to time of birth in (S); and the title of an administrator relates back to death of the intestate in (E).
DRIFT WAY (E) = (S) drove road; also *actus*.
DROIT, AUTER (E) *see* "Auter Droit."
DROVE ROAD (S) *i. e.*, a right to drive cattle over another person's lands, *M. Breadalbane* v. *Macgregor*, 7 Bells, Ap. C. 43 = (E) driftway or highway for cattle, 287, 312.
DUCES TECUM, SUBPŒNA (E) *i. e.*, a writ ordering a witness to attend and bring certain documents with him = (S) diligence citing a haver.
DUPLICATE of a writing (S) = (E) copy of a deed or deed poll; if a deed of indenture, a counterpart, in which latter case the deed is said to be interchangeably executed (E) = "signed or executed in duplicate" (S).
DUPLICITY IN PLEADING (E). *See* "Double Pleading."
DURESS (E) = (S) force; in contracts, 457; in bills of exchange, 556.
DYING DECLARATION (S) = (E) same, 985.
DYVOUR (S) (obsolete) = (E) bankrupt or insolvent.

EARNEST (E) = (S) same, also arles; in sale of goods, 522; in hiring servants, 824.
EARNINGS OF WIFE; protection of may be obtained by wife when deserted or separated, 870; *contra* in (S), *ibid.*
EASEMENT (E) *i. e.*, a privilege without profit, which one owner has in the property of another, as a right of way = (S) included in servitude, 286; of right of way, 287; watercourse, 288.
EASTER TERM (E) one of the four legal terms or times for the sitting of the courts of law in banc, beginning 15th April and ending 8th May = (S) not used. There are only two sessions in a year, 1056.
EAVESDROP (S) *i. e.*, the space nine inches, to carry off rain water = (E) easement of water drip.
ECCLESIASTICAL COURTS (E) formerly included Courts of Probate and Divorce, now confined to courts for discipline of the clergy = (S) as regards divorce, the Court of Session; as to testaments, the Commissary or Sheriff Courts; as to discipline of clergy, the Presbytery, Synod, and General Assembly.
——— CORPORATION (E) *i. e.*, a corporation, sole or aggregate, consisting of spiritual persons. Thus corporations sole are bishops, deans, parsons, and vicars; corporations aggregate are such as the dean and chapter.
EDICTAL CITATION (S). *See* also "Citation, Edictal" = (E) not known. There is no regular office for such citations, but leave to substitute service at the last place of abode for personal service may now be obtained in some cases from the court, or leave to serve out of the jurisdiction.
EDICT IN CONFIRMATION (S) abolished = (E) citation.
——— "NAUTÆ, CAUPONES, etc." (S) *i. e.*, so much of the Law of Bailments as applies to the liability of carriers = (E) not used, but the law is similar, 603.

EFFECTUAL ADJUDICATION (S) *i. e.*, an adjudication which has been completed as a feudal right in the person of the adjudger = (E) completed elegit.

EFFEIRING (S) = (E) appurtenant to, also pertaining or belonging to, and proportioned to.

EFFEIRS (S) "in form as effeirs" = (E) according to law.

EIK TO A CONFIRMATION OF A TESTAMENT (S) *i. e.*, addition to inventory = (E) adding to assets proved.

——— TO A REVERSION (S) = (E) equitable mortgage for further advances.

EJECTION AND INTRUSION (S). Intrusion is also called forcible entry in (S) = (E) disseisin, also ouster. A plea of entry and eviction is a good answer to an action of covenant for rent.

EJECTMENT, ACTION OF (E). When judgment has been given for the plaintiff, the writ of execution issued to the sheriff to oust the defendant and give possession to the plaintiff is called a writ *habere facias possessionem* = (S) action of removing. When decree of removing has been pronounced, the process was completed by letters of ejection formerly, now by a precept of ejection, 425, 1058.

——— by landlord, 425.

ELDERS OF CHURCH (S) *i. e.*, lay members of the Established Church of Scotland, who are members of the kirk-session, and chosen by the kirk-session. He has, as such member, an equal vote with the minister, and may be chosen representative elder of the kirk-session in the General Assembly. A certain proportion of elders must be in each Presbytery, Synod, and General Assembly = (E) no such officers. Certain parochial officers called churchwardens represent the parish, but have few ecclesiastical duties. Deacons belong to the order of clergy, and are not laymen.

ELECTION (E) *i. e.*, choosing one or other of two provisions or remedies = (S) as to deeds, doctrine of approbate and reprobate, 710.

——— of civil or criminal remedy, 941.

ELEEMOSYNARY CORPORATIONS (E) *i. e.*, charitable corporations = (S) hospital, mortification.

ELEGIT, WRIT OF (E) *i. e.*, the writ of execution by which a judgment creditor obtains possession of his debtor's real estate, and holds it till the debt is paid; and if not paid, he can get an order of the Court of Chancery to foreclose and sell the property. Elegit is an exclusive title to the judgment creditor = (S) action and decree of adjudication. The adjudger, when he completes his title, makes the adjudication effectual under the Stats. 19 & 20 Vic. c. 79, 19 & 20 Vic. c. 91. Adjudication is not a private diligence, but one in which all the other creditors have an interest, 1134, *et seq.*

——— a kind of mortgage, 131; goes to executor, 133.

ELISORS (E) *i. e.*, neutral persons chosen to summon a jury when the sheriff or coroner is challenged for partiality = (S) not used.

EMANCIPATION OF CHILD (S) *i. e.*, its liberation from the *patria potestas* = (E) not used, except in poor-law settlements.

EMBLEMENTS (E) = (S) industrial and natural fruits, *i. e.*, the profits of sown land; and, in a larger acceptation, any products springing naturally from the ground, as grass, fruit, etc.

——— right of tenants for life to, 68; of tenants for years to, 397.

EMBRACERY (E) *i. e.*, an attempt to bribe a jury = (S) not used.

EMITTING AN OATH (S) = (E) deposing or giving evidence on oath.

EMPANNELLED. *See* "Impannelled."

EMULATIO VICINI (S) *i. e.*, where a person uses his property so as to annoy his neighbour = (E) the same, but little used.

ENACT (S) as to enact a purchaser = (E) to substitute or put the purchaser in the place of the agent.

ENFRANCHISEMENT of copyholds (E) which is compulsory at the instance of either the lord or the copyholder = (S) not known; neither a vassal nor a superior can compel enfranchisement, 200.

ENGROSS (E) a deed, etc. = (S) extend a deed.

ENMITY (S) *i. e.*, ground for rejecting witness = (E) hostility is no ground for rejecting witness, but affecting credibility only.

ENROLMENT (E) *i. e.*, registering certain deeds in the Court of Chancery = (S) registration.

ENTAIL (S) = (E) estate-tail, also settlement or will creating the estate-tail.

——— origin of, 28; exists for ever, *ib.*; destination in entail, 30, 31; fetters by prohibitory, irritant, and resolutive clauses, 32; disentailing, how, 33, 34, 35; how far differs from simple destination, 36, 37, 38; end of entail, 39; institute and substitute, what, 43; as to the fee, 44; forfeiture by heir for treason, 45; bankruptcy of heir, 46; creditors of, 47; debts of entailer, 48; powers of heir, 49; is heir of provision to predecessor, 51; restrictions on heir, 52; registration of entail, 53, 54; apportionment of rent at death of heir, 69.

ENTIRETIES, tenancy by (E) = (S) not known, 167.

ENTRY OF AN HEIR (S) which is essential to complete his title to the lands, being completed by infeftment proceeding on the superior's precept. He enters after service, or by precept or writ of *clare constat* = (E) on copyhold, admittance. In freehold, no term, for *mortuus sasit vivum*, 779.

——— OF PURCHASER (S) *i. e.*, completion of a purchaser's title to a heritable subject by infeftment or its equivalent, and confirmed by the superior = (E) not known and not necessary, except in case of a purchaser of a copyhold estate, 25, 184, 364.

EQUIPOLLENTS (S) = (E) not used; anything constructive or implied, which is equivalent to something express.

EQUITABLE ESTATE (E) *i. e.*, a kind of property in lands or tenements which a court of law may not recognize, but which a court of equity will = (S) not used, but in like situations the law recognizes such interest.

——— MORTGAGE (E) *i. e.*, a mortgage which a court of equity will enforce on the principle, that what is intended to be done is already done, thus, depositing title-deeds of an estate with a person in security for a loan is an equitable mortgage = (S) not known, 97, 123, *et seq.*

EQUITY COURTS, or Court of Chancery, origin of jurisdiction, 1052, 1150.

——— OF REDEMPTION (E) *i. e.*, the right of a party who has mortgaged his estate to pay off the mortgage and obtain a reconveyance = (S) reversion, 100, 117.

ERASURES IN A DEED (S) = (E) the same, 348.

ERECTION OF A BARONY (S) where the Sovereign incorporates several lands together in one holding, it gives some privileges as to infeftment = (E) not known. The Crown cannot now create a manor; it must have existed for centuries by custom.

ERROR (S) in contracts, often called error *in essentialibus* = (E) mistake, 453.

——— WRIT OF, (E) now called suggestion of error as regards C. L. courts, but writ of error still exists as to criminal courts, being an appeal on the ground of some error in the record = (S) advocation from Sheriff Court; reclaiming petition from Lord Ordinary's interlocutor; appeal to House of Lords.

——— SUGGESTION OF (E) formerly writ of error, which see = (S) reclaiming petition to Inner House, or appeal to House of Lords, 1043.

ESCAPE (S) from prison = (E) escape; also rescue.

ESCHEAT (E) *i. e.*, when a man dies without a will or heirs, his estate escheats to the lord or the Crown, according to circumstances = (S) succession of Crown as *ultimus hæres*, 3, 21, 182.

———, LIFERENT (S) *i. e.*, the forfeiture to the superior of the annual profits of the vassal's lands during his life = (E) escheat to the lord of copyhold estates; and also of freehold estate, where there is a lord, otherwise to the Crown, 3, 21, 182.

——— SINGLE (S) = (E) forfeiture; estates in fee-simple go to lord in (E), 3; *contra* in (S), to Crown, *ibid*; escheat for treason and murder, 3; of copyhold estates, 182.

ESCROW (E) *i. e.*, a deed delivered to a third party, but not to operate until a certain event occurs = (S) no term, 339.

ESPOUSALS, OR SPONSALIA (S) = (E) mutual promise of marriage.

ESTATE FOR LIFE (E) = (S) liferent is freehold, 55; of feudal nature, 55; *pur autre vie*, 56; how created, 59; legal estates for life, 63; powers of tenant, 64; without impeachment of waste, 66; death of tenant, 69; security against waste, 70; tenant alienating, 71; maintaining reversioner, 72.

——— FOR YEARS, or a term (E) = (S) lease; what, 73; goes to executor, 73; cesser of term, 75.

——— TAIL (E) = (S) entail or entailed estate.

——— origin of, 28; limitation of, 30, 31; restrictions on tenants in tail, 32; barring estate tail, 33, 38; exceptions to barring, 39; consequence of not barring, 42; as to fee, 44; forfeiture for treason by tenant in tail, 45; creditors of tenant, 46; powers of tenant, 49; issue of tenant take by descent, 51; conditions imposed on tenant, 52; deed or will need not be registered, 53, 54; after possibility of issue extinct, 39; *ex provisione viri*, 40; *quasi* estate tail, 57; devise of estate tail, 725; descent of, 766.

——— in possession, reversion, and remainder, 139, *et seq.*

ESTOPPEL (E) *i. e.*, where a party is held bound by his own statement in a deed which he is not allowed to contradict = (S) no term, personal bar, homologation, 436.

——— IN PAIS (E) where a party is estopped by his own act or conduct from representing something different from what such conduct implied = (S) personal bar or exception; *rei interventus*; homologation.

ESTOVERS (E) or common of estovers, *i. e.*, such timber as a tenant for life or for years may take from the land = (S) timber necessary for repairs by liferenter, 64; by tenant for years, 396; common of estovers, 280.

ESTRAYS, *i. e.*, stray cattle, belong to Crown, 11.

ESTREAT (E) a recognisance is estreated, when, the party having forfeited the

same, execution is enforced by order of a justice = (S) warrant to poind or imprison.

EVICTION (S) *i. e.*, dispossessing one of lands or moveables by a superior title = (E) the same as to land. It is called ouster, where tenant is merely deprived of possession.

EVIDENCE (E) = (S) proof; proving a deed, 353; evidence in criminal cases, 973; in civil cases, 1090, 1097, *et seq.*

EVIDENTS (S) = (E) assurances or title-deeds.

EXAMINATION BEFORE A MAGISTRATE (E) = (S) examination of a prisoner.

EXAMINED COPY (E) *i. e.*, a copy which the witness, producing it, compared with the original = (S) compared copy.

EXAMINER IN CHANCERY (E) *i. e.*, an officer appointed to take the *viva voce* examination of witnesses, and return the same to the Court of Chancery = (S) no such officer; but commissioners may be appointed to take proof.

——— (E) at C. L. when a witness is within the jurisdiction, but too ill to attend court, the court will grant an order to an examiner to take the deposition = (S) commissioner to take proof, 1093.

EXCAMBION (S) = (E) exchange of lands, 321; contract of excambion (S) = (E) deed of exchange.

EX CAPITE LECTI (S) *i. e.*, right to reduce or set aside a deed on the head of deathbed = (E) not known, and not competent, 675.

EXCEPTION (S) *i. e.*, objection by way of defence = (E) not technical; objection by way of plea.

EXCEPTIONS in conveyance or lease (E) = (S) clause of reservation, 361, 377.

——— (E) in Ch., as where a party excepts to the report of the master or chief clerk; exceptions are overruled or allowed = (S) objections to the auditor's or accountant's report; objections are repelled or sustained.

EXCEPTIO REI JUDICATÆ (S) = (E) at C. L., plea of judgment recovered.

EXCHANGE OF LANDS (E) = (S) excambion, 321.

EXCHEQUER, COURT OF (E) *i. e.*, one of the superior courts of common law = (S) same, also Court of Session; its jurisdiction in (E) 1055; in (S) 1055 *n.*

——— CHAMBER (E) *i. e.*, court of appeal from any of the common law courts = (S) Inner House, 1057.

EXCLUDING AN ACTION (S) = (E) barring an action.

EXCULPATION, LETTERS OF (S) = (E) subpœna of prisoner's or defendant's witnesses.

EXCUSABLE HOMICIDE (E) = (S) justifiable homicide.

EX DELICTO, actions, or for torts (E) = (S) actions for *quasi* delicts, 506.

EXECUTED CONSIDERATION (E) *i. e.*, where the consideration is something already done, in which case it is no ground for an action = (S) not known, and no such consequence.

——— TRUST (E) *i. e.*, where the trust has been duly constituted and nothing more requires to be done = (S) not used.

EXECUTION (OF SUMMONS OR CITATION), (S) = (E) service of summons or subpœna; an affidavit of service of writ or summons at C. L., and of bill and claim in Ch. is no part of the service, though it is evidence thereof, 1069, 1090, 1153.

——— (E) = (S) diligence against the person and property. *See* "Diligence."

EXECUTION CREDITOR (E) = (S) the poinding creditor, or adjudicating creditor, as the case may be.

——— OF DEEDS (E) = (S) the same; also authentication of deeds.

——— OF THE LIBEL, OR OF SUMMONS AND INDICTMENT (S) = (E) service of the indictment is not necessary in E., because the prisoner is informed of the charge when examined before the magistrate who commits him for trial, and, in some cases only, is he entitled to a copy of the indictment, even when he asks it. Even where he has not been examined before a magistrate, no copy of the indictment requires to be served upon him, 962.

EXECUTOR (E) = (S) executor nominate; nomination of, 680; proving will, 680; vesting of estate, 681; dying, 682; claim to residue, 683; duty to pay debts, 684; preferring his own debt, 690; de son tort, 695; personal liability, 696; legacies, 699, 706; who entitled to be, 732; creditor appointed administrator, 733; right to devolve administration on Court of Chancery, 790.

——— CREDITOR (S) = (E) not used, though a creditor may, in certain cases, be admitted to act as administrator, and he "obtains letters of administration," like other administrators, 733, 791.

——— DATIVE (S) = (E) administrator, 680.

——— DE SON TORT (E) = (S) vitious intromitter, and his conduct is called vitious intromission, 695.

——— NOMINATE (S) = (E) executor, 680.

EXECUTORS (S) sometimes used to denote next of kin = (E) next of kin.

EXECUTORY DEVISE (E) *i. e.*, mode of limiting future estates by will = (S) no term; the object is generally effected by means of entail, 729.

——— INTEREST (E) an interest to be created *in futuro* = (S) future interest.

——— TRUST (E) *i. e.*, where the trust is not completely created, but something more requires to be done = (S) not used.

EXECUTRY (S) *i. e.*, the whole moveable estate of a deceased person which falls to the executor = (E) personalty.

EXEMPLIFICATION (E) *i. e.*, a process under the Great Seal for removing into one court the record of another court, in order to its being proved = (S) extract.

EXERCITOR (S) = (E) owner of ship; also charterer.

EXHIBIT (E) *i. e.*, a document attached to an affidavit or deposition, and referred to therein = (S) relative production, or production referred to.

EXHIBITION (E) in college of university = (S) the same, also bursary.

——— ACTION OF (S) = (E) bill in Ch. for a discovery; also action of detinue for deeds or papers. In action at law a rule for inspection of documents, and discovery of evidence may be had; and in suit in Ch. the court will order production or deposit of documents, 1100-2, 1156.

EXIGENT, OR EXIGI FACIAS (E) a writ used in outlawing a defendant.

EX OFFICIO INFORMATION (E) (by Attorney-General) = (S) criminal letters, 959.

EXONERATION (S) = (E) discharge, or release, or right to contribution.

——— OF REAL ESTATE (E) = (S) order of responsibility and relief among heirs, 785.

——— (E) = (S) relief or order of responsibility.

EXONERETUR (E) *i. e.*, an entry made on a bail piece, signifying the discharge of the defendant from custody = (S) not used.

EXPECTANT (E) = (S) having a *spes successionis.*

——— ESTATES (E) *i. e.*, estates or interests which are to come into existence *in futuro;* they are generally called estates in reversion or remainder = (S) *spes successionis* in some instances; right of a substitute as to entails and dispositions.

EXPEDE (S) = (E) to sue out.

EXPENSES (S) = (E) costs; bill of costs· (E) = (S) account of expenses on agent's account; of bond and disposition in security, 116 *n*, 1226; of conveyance, 326, 1226; of lease, 1226.

EXPIRY OF THE LEGAL, DECLARATOR OF (S) = (E) bill in Ch. by a tenant in elegit for a foreclosure and sale, 132, 1138.

EXPIRATION OF LEASE (S) = (E) determination of lease by effluxion of time.

EXPOSURE, INDECENT (E) = (S) indecent practices, which includes exhibition of the person.

EXTENDING A DEED (S) = (E) engrossing a deed.

——— LAND (E) under a writ of elegit = (S) adjudging the land, 1137.

EXTENT, WRIT OF, in Crown Cases (E) = (S) same in Exchequer causes.

——— (E) of lands under execution of an elegit = (S) adjudication for debt, 1137.

EXTINCTION OF CONTRACTS (S) = (E) extinguishment of contracts.

EXTINGUISHMENT OF CONTRACTS (E) = (S) extinction of contracts.

EXTORTION (S) an indictable offence = (E) demanding money with threats.

EXTRACT OF DEED, etc., (S) = (E) office or certified copy of deed.

——— OF DECREE (S) = (E) no such form. At the proper time the party at C. L. signs judgment, on which execution or diligence may be had immediately, 1123. In Ch. the decree must be first served, then enforced, 1160.

——— OF PROTESTATION (S) = (E) judgment of *non-prosequitur* or *non-pros.* 1080, 1115.

——— REGISTERED PROTEST (S) = (E) office copy of a recorded protest.

EXTRACTOR (S) *i. e.*, officer of court so called, who gives out authentic copies of decrees or deeds recorded = (E) officer of court.

EXTRAORDINARY ACTIONS (S) *i. e.*, certains actions so called, as adjudication (elegit E), count and reckoning (bill in equity for an account E), ranking and sale (administration suit, etc., E), sale of a pupil's heritage (bill in equity praying for a sale, E), division of commonty and division among heirs-portioners (bill in equity for a partition E), choosing of curators (petition to appoint guardians E), poinding of the ground (distraining for rent E), and the like. Peculiarities of procedure formerly belonged to these actions.

EXTRINSIC FACTS (S) *i. e.*, certain matters sworn to in a party's evidence under a reference to his oath, which the court considers collateral to the subject matter = (E) collateral facts, 481.

EYRE, JUSTICES IN (E) old title for judges, who were itinerant.

FACILITY (S) *i.e.*, a state of mind not idiotic, but approaching thereto, during which the facile person is easily imposed on. His remedy is interdiction = (E) not used; weakness of mind; there is no remedy by way of interdiction, but weakness of mind will be an element of fraud, 802.

FACTOR (S) in mercantile matters = (E) the same, 614.

——— (S) *i. e.*, a law-agent managing the letting of farms and other business connected with heritable estate = (E) steward.

——— JUDICIAL (S) = (E) receiver; also committee, 791, 800.

FACTS, STATEMENT OF (S) = (E) not used, it being included in a pleading, 1073.

FACTUM PRÆSTANDUM, ACTION AD (S) = (E) suit for specific performance in Ch; at C. L. an attachment only can be issued for disobedience of an order or rule of court ordering something to be done.

FACULTY (E) *i. e.*, a grant of a pew in church by the ordinary = (S) no term; allocation of seat by sheriff in a judicial division.

——— (S) = (E) a power; "*to exercise a faculty*" (S) = (E) "to execute a power," or "to appoint," 291.

——— TO BURDEN (S) = (E) "power to charge lands."

——— OF ADVOCATES (S) *i. e.*, the body of advocates, who elect one of their number who is called Dean of the Faculty, and is their leader = (E) barristers-at-law are members of one or more Inns of Court, each of which is independent of the other, 1209.

FALLING from (a summons or warning) (S) = (E) waiving or abandoning. A mandate falls (S) = (E) the authority is revoked.

FALSA DEMONSTRATIO (S) = (E) misnomer or misdescription in a deed or will.

FALSEHOOD (S) = (E) forgery.

FALSE IMPRISONMENT (E) = (S) included in wrongous imprisonment, 514.

——— PRETENCES, obtaining goods or money by, formerly called "swindling" (E) = (S) fraud and cheating.

——— JUDGMENT, writ of (E) a writ to bring up a judgment of a petty court, with a view to amend mistake = (S) advocation; suspension and advocation.

——— SWEARING (S) = (E) perjury.

FAMA CLAMOSA (S) *i. e.*, an ecclesiastical description of a current report of immorality against a clergyman, etc. = (E) evil rumour.

FANG (S) *i. e.*, old term for stolen goods = (E) stolen goods.

FARM SERVANTS (S) = (E) servants in husbandry.

——— STOCK, 389. *See* "Landlord and Tenant."

FATUOUS PERSON (S) = (E) idiot.

——— AND FURIOUS (S) = (E) idiot and lunatic, 800.

FEAL AND DIVOT (S) servitude of = (E) common of turbary, 281.

FEALTY (E) *i. e.*, obsolete oath on admittance of tenant = (S) no term.

FEE (S) = (E) fee-simple; also reversion and remainder. As to fee in heir of entail, 44.

——— AND LIFERENT (S) = (E) the remainder or reversion and a life estate.

FEE-EXPECTANT (E) = (S) not used; interest of a fiar before death of a life-renter.

FEE-FARM OR FEE-FARM RENT (E) = (S) superiority.

——— RENTS OF THE CROWN (E) = (S) right of superiority of the Crown.

FEE-FUND (S) *i. e.*, fund arising from fees of court = (E) not used generally; fees of court.

FEE-SIMPLE (E) = (S) fee, so far as the feudal tenure permits a tenant to have the fee entire; limitation of estates in, 23.

FEE-TAIL (E) = (S) entail; also simple destination, 36.

FEES OF ATTORNEYS AND OFFICERS (E) regulated by rules and orders of Court = (S) the same; also dues.

——— OR HONORARIES (S) = (E) same.

FEIGNED ISSUE (E) *i. e.*, an issue arising out of a suit in Ch., or some interlocutory application at C. L., ordered to be tried at *nisi prius* = (S) not known; but the court in like manner orders issues to be tried before a jury in various actions.

FELON (E) *i. e.*, one convicted of certain crimes called felonies, which are more serious than misdemeanours = (S) convicted of crime; forfeiture of goods, 804, 950.

FELONIOUS INTENT (E) = (S) dole.

FELONY (E) a crime greater than a misdemeanour = (S) not known; crimes are not classed in the same manner, 950.

FEME COVERT (E) = (S) married woman.

FEME SOLE (E) = (S) an unmarried woman.

FENCES (E) = (S) the same; also marches. *See* "Marches."

FEOFFEE (E) *i. e.*, he to whom a feoffment is made = (S) disponee infeft.

FEOFFMENT (E) *i. e.*, a common law assurance, by which a fee-simple is conveyed and preceded by livery of seisin, now superseded by deed of grant = (S) disposition, with sasine, which follows thereon, 357.

FEOFFOR (E) he who makes a feoffment = (S) disponer.

FERIAL DAYS (E) seldom used; days other than holidays.

FERRY, RIGHT OF, in (E) 8; same in (S), *ib.*

FETTERS (S) *i. e.*, certain clauses in a strict deed of entail, so called, the effect of which is to prevent the heir of entail selling, alienating, incumbering the estate, or altering the succession = (E) not known; the covenants and conditions in a strict settlement do not operate so strictly or for such a length of time, 28, 38.

FEU (S) *i. e.*, land held on feudal tenure = (E) copyhold in form, but freehold in substance, 16; general nature of feudal holding, 18; as distinguished from freehold in E, 20; vassal has right to mines, 20, 176; incidents of feu, 21; resembles copyhold, 174; feu-duty, 179; relief payable by heir, 180; composition by singular successor, 183; mode of sasine, 185; personal right to lands, 186; purchaser may compel entry, 187; infeftment, 187; title of heir, 188; non-entry, 189.

——— CHARTER (S) *i. e.*, conveyance of a feu by a superior to which the vassal is not a party = (E) grant or conveyance by way of deed-poll, 361.

——— CONTRACT (S) *i. e.*, a deed between a superior and vassal with mutual stipulations = (E) conveyance by way of indenture, 361.

——— DUTY (S) = (E) rent or fee farm rent in copyholds, 179; in freeholds, rent, but it seldom exists, 18, 21.

——— FARM (S) tenure of feuholder or vassal = (E) resembling copyhold tenure, 173, 174.

——— TINSEL OF THE (S) = (E) in freehold, not known; in copyhold, seizing by the lord *quousque*, 179, 189; in lease, forfeiture of lease.

FEUDAL TENURE (S) *i. e.*, the universal tenure in Scotland. The interest in land is split up into two or more parallel estates of inheritance; one called the *dominium directum*, belongs to the superior; the other, called the *dominium utile*, and which is the larger interest, belongs to the vassal or feu-holder. Every holder of land must either be a vassal

of the Crown, or of a Crown vassal, and he may be a superior, in like manner, to those below him = (E) not known, except in the form of copyholds, which exist by ancient custom, and must have existed for centuries; no new tenure of that kind can now be created, 18, 173.

FIAR (S) = (E) reversioner or remainder-man, according to the mode of creation of his estate, 61, 139; heir of entail is, 45.

FIARS (S) *i. e.*, average local prices of grain fixed by the sheriffs to regulate the payment of stipend, rent, and prices not expressly agreed upon, etc. The sheriff is said to strike the fiars, which he does, under the Acts of Sederunt, 21st Dec. 1723 and 29th Feb. 1728, by calling a jury; Act of Sederunt, 9th March 1850; *Howden*, 13 D. B. M., 522. *See* "Paterson on the Fiars" = (E) not known.

FIAT IN BANKRUPTCY (E) now adjudication of bankruptcy = (S) award of sequestration, 1175.

FIERI FACIAS, WRIT OF (E) *i. e.*, the writ of execution, which a judgment creditor issues to the sheriff, commanding him to take and seize the goods of the debtor, and thereof pay the debt indorsed on the writ = (S) warrant to poind the moveables, 1131.

FILIATION (S) = (E) the same, 854.

FINE (E) *i. e.*, in copyhold estates = (S) relief; also composition, 180, 183.

——— ON LEASES BY CORPORATIONS (E) = (S) grassum, 401.

——— (E) *i. e.*, old mode by which a tenant in tail barred his estate tail, and acquired the fee-simple by a fictitious process now abolished = (S) not known, petition to disentail fines abolished, 28.

FIRE, rent payable in case of, 402.

——— AND SWORD, LETTERS OF (S) *i. e.*, an ancient writ by which tenants refusing to leave lands contrary to the order of a judge or legal diligence, were dispossessed by the sheriff with the *posse comitatus* = (E) not used; writ of *habere facias possessionem*, 425.

——— BOTE (E) wood for fuel allowed to tenants = (S) no term, 64.

——— RAISING (S) = (E) arson.

FIRM (E) = (S) the same; also company, 639.

FISH, ROYAL, what are in E., 6; in S. *ib.*

FISHERIES (E) = (S) fishings; different kinds of, 6; salmon, *ib.*

FISHINGS (S) = (E) fisheries, also common of piscary.

FISK (S) = (E) right of the Crown to revenue.

FLOTSAM (E) *i. e.*, goods floating from a wreck = (S) sometimes also used.

FORCE AND ARMS (E) terms usually inserted in indictments to denote actual violence.

——— AND FEAR (S) = (E) duress; in contracts, 457; in bills of exchange, 556.

FORCIBLE ENTRY (E) = (S) ejection and intrusion.

FORECLOSURE (E) = (S) declarator of expiry of the legal, in adjudications; as to bonds and disposition in security, redemption, 111, 113. *See* "Mortgage."

——— BILL FOR (E) = (S) action to redeem, as to bonds and dispositions in security; declarator of expiry of the legal, as to adjudications.

FOREHAND RENT (S) = (E) rent reserved payable in advance, or by anticipation, 400.

——— (E) = (S) grassum, *i. e.*, a premium paid on entering on a lease, 401.

FOREIGN (S) *i. e.*, a title of law relating to rights of foreigners = (E) no term,

aliens, or persons out of the jurisdiction; jurisdiction over foreigners, 1059, 1241.

FOREIGN ATTACHMENT (E) *i. e.*, a peculiar process in the city of London and York, whereby not only after, but before judgment, the creditor can attach the debts due to his debtor in the hands of third parties as security = (S) arrestment, which is not confined to any locality, but is the common law, 1120, 1247.

FORFEITURE (E) which as to felonies is generally called escheat = (S) the same; also tinsel of feu, or irritancy; of freehold for treason, 3; of estate tail, 45.

——— of hypothec (S) = (E) loss, or extinguishment of right of distress.

FORMA PAUPERIS (E) *i. e.*, poor persons may sue *in forma pauperis* = (S) so poor persons are entitled to the privilege of the *poor's-roll*, 1212.

FORMEDON, WRIT OF (E) old writ, now abolished in nearly all cases, whereby a tenant in tail recovered right to the estate = (S) not used; declarator of contravention of the entail.

FORMS OF ACTIONS (E) *i. e.*, technical distinctions used in framing pleadings at C. L. = (S) not used; styles of summonses, 1058.

FORNICATION (S) as a crime (obsolete).

FORTHCOMING (S) *i. e.*, an action to complete an arrestment = (E) in city of London and York, condemning money to the use of the creditor attaching; elsewhere, only competent after judgment, and called order for payment of debts by garnishee, 1120.

FOUND GOODS, right of finder to, 10. *Contra* in S. *ib.*

FRANCHISE (E) = (S) privilege.

FRANKALMOIGN, TENURE IN (E) = (S) mortification, 16.

FRANKMARRIAGE, GRANT OF ESTATE IN (E) = (S) not known, 31.

FRAUD (E) *i. e.*, confined to ground of action or suit, or defence in civil actions only = (S) same, also fear, circumvention, 455; must be specially alleged, when, 455; constructive fraud, 456.

——— CONSTRUCTIVE (E) *i. e.*, such acts and conduct as are not originated in direct fraud, but in their natural tendency lead to the same results. Hence, courts of equity adopt a presumption against contracts or transactions tainted with this kind of fraud, such as transactions between parent and child, guardian and ward, purchase of reversionary interests, etc. = (S) not used, and the same doctrine is not adopted, at least in some of the cases, as the sale of reversionary interests, 456.

——— *i. e.*, a criminal offence (S) = (E) obtaining goods by false pretences; also cheating.

FREEBENCH (E) *i. e.*, a wife's dower, when issuing out of copyhold lands of her husband = (S) terce, 907.

FREEHOLD (E) *i. e.*, an estate of inheritance, being the largest that any subject can have in lands = (S) no term, equivalent to the superiority and the feudal estate consolidated, no feu-duty being payable; how far held of Crown, 13, 14, 20; absolute right to soil, 20; incidents of freehold tenure, 21; classification of freeholds, 22; alienation of, 25, 26; estates for life, 55.

——— ESTATE FOR LIFE (E) = (S) liferent which is classed with servitudes, 55.

FREEHOLDER, OR TENANT IN FREEHOLD (E) *i. e.*, one having a freehold estate = (S) not used, all persons holding land being vassals. *See* "Feu;" forty-shilling freeholders, 1035.

FREIGHTER'S lien on ship, 580.

FRUCTUS PENDENTES (S) = (E) growing crops or fruits.

——— PERCEPTI (S) = (E) severed crops or fruits.

FUGÆ WARRANT (S) *i. e.*, a warrant to arrest an absconding debtor *in meditatione fugæ* = (E) judge's order to hold to bail; also warrant to arrest absconding debtor.

FUGITATION, SENTENCE OF (S) = (E) outlawry in crim. process.

FUNERAL EXPENSES (S) = (E) the same, but not so extensive; include mourning in S, *contra* in E, 685, 913.

FUNGIBLES (S) *i. e.*, corn, fruit, and other things which perish in the use, and are estimated by weight, number, or measure = (E) no term; perishable and other commodities.

FURIOSITY (S) = (E) lunacy, insanity, 800; contract must be reduced, 801.

——— BRIEVE OF (S) = (E) writ or commission *de lunatico inquirendo*, 801.

FURNISHINGS (S) = (E) goods and materials supplied.

FURNITURE, landlord's power over, 406, *et seq.*, 541.

FURTH OF SCOTLAND (S) = (E) abroad, or out of the jurisdiction, 1059, 1061, 1241-8.

FURTHER ASSURANCE, COVENANT FOR (E) *i. e.*, a covenant in a deed to execute any further deeds considered necessary to carry out the object of the deed = (S) not used; included in clause of warrandice.

——— CONSIDERATION (E) *i. e.*, a cause in Ch. is brought on for further consideration after the certificate of the chief clerk has been made; either party may set the cause down for the above purpose = (S) not used.

——— DIRECTIONS (E) in Ch. when the master had made his report, and exceptions were taken to it, the validity of these exceptions were reviewed on a petition for further directions; now an application to vary the certificate of the chief clerk = (S) not used.

FURTUM GRAVE (S) old term; theft of £100 and upwards = (E) like grand larceny as distinguished from petty larceny.

FUTURE advances on real estate, 97.

——— rent, security for, 404.

——— DEBT (S) *i. e.*, a debt contracted, but not yet due and payable = (E) no term, debt not due, 479.

GABLE, right to mutual (S) = (E) party wall.

GAME as between landlord and tenant, 395; hares and rabbits, *ib.*

GAMING AND BETTING, illegal debts, 459.

GAOL DELIVERY (E) *i. e.*, an expression used in the commission of judges of assize, who are to deliver the gaols, *i. e.*, try the prisoners committed for trial, 940.

GARNISHEE (E) *i. e.*, the party in whose hands debts due to the plaintiff from the defendant have been attached = (S) arrestee, 1120.

GAVELKIND (E) *i. e.*, custom of Kent, whereby all the sons succeed equally to real estate = (S) not known, 15, 757.

GENERAL ASSEMBLY (S) *i. e.*, an annual meeting of the clergy of the Scotch Established Church as a Court of Appeal in cases of discipline, and where also general subjects are discussed = (E) not known. The convocation has no jurisdiction as to discipline, and only meets for form's sake, 991.

GENERAL CHARGE. *See* "Charge to Enter Heir."

——— DEMURRER (E) where the insufficiency of the pleading demurred to is stated in general terms; where it was specifically stated, it was called a special demurrer, now abolished = (S) not used; plea or objection to the relevancy, 1078.

——— DISCHARGE (S) = (E) discharge or release.

——— DISPOSITION AND SETTLEMENT (S) which must be by deed, if it include heritable estate = (E) will, 661, 718.

——— ISSUE (E) *i. e.*, a common form of plea, on which issue is joined, and which lets in certain evidence only = (S) not known, for all pleas are special, 1073.

——— LIEN (E) = (S) the same; also retention.

GERMAN (S) brothers and sisters by the same father and mother.

GESTIO PRO HEREDE (S) *i. e.*, behaviour as heir, whereby a person incurs a passive title, or becomes liable for all the ancestor's debts = (E) in real estate not known; a person so interfering would only be liable as any ordinary trespasser, 781.

GIFT OF BASTARDY (S) *i.e.*, common grant of bastard's estate = (E) grant of bastard's estate.

——— OF MONEY may be proved by parole in (E), 450; contra in (S), *ib.*

——— OF TUTORY (S) *i. e.*, appointment of a tutor = (E) appointment of guardian.

GIRTH AND SANCTUARY (S) old places of refuge for homicides (abolished).

GLEBE (S) = (E) same, but there is no universal right of an incumbent, 1018.

GOOD FRIDAY (E) a holiday in all law courts and offices = (S) not recognised; as to bills of exchange due on, 562.

GOODS IN COMMUNION (S) *i. e.*, on marriage, the moveable goods, whether formerly belonging to the husband or the wife form a common fund, as to which the widow and children have certain indefeasible rights on the husband's death = (E) not known; for the goods belong absolutely to the husband with some qualifications, 883.

——— AND CHATTELS (E) = (S) goods or moveables.

GRACE, ACT OF (S) *i. e.*, a statute providing aliment at the incarcerating creditor's expense to civil prisoners, who are otherwise destitute = (E) not known, 1129.

——— DAYS OF (E) = (S) the same.

GRAND DAYS (E) certain days kept in the Inns of Court during term, which are now practically the same as other days = (S) not known.

——— JURY (E) *i. e.*, a jury of from twelve to twenty-three, who examine witnesses *ex parte* as to a crime charged in the indictment, and if they find there is a *prima facie* case they indorse "a true bill," which has the effect of putting the person charged on his trial before a petty jury. If the grand jury find there is no true bill, they ignore the bill, or indorse it "no true bill," which releases the party charged, 957 = (S) not known, except in cases of treason, 957. In ordinary cases the public prosecutor sees that there is a *prima facie* case, 958.

GRANT (S) *i. e.*, a term used in original dispositions of land and gratuitous deeds = (E) nearly the same.

——— (E) deed of = (S) disposition, or feu-charter, or feu-contract, according to circumstances, 360.

GRANT TO (E) *i. e.*, technical word of a conveyance, but not essential = (S) to dispone, which is a word essential to a disposition, 361.

GRASSUM (S) = (E) premium paid for a lease; fine; forehand rent, 401.

GRATUITOUS DEED (S) = (E) the same; also voluntary conveyance.

GRAY'S INN (E) one of the four Inns of Court, having power to call persons to the bar, etc. = (S) Faculty of Advocates, 1209.

GREAT AVIZANDUM (S) *i. e.*, where a Lord Ordinary does not decide a case himself, but reports it to the Inner House for decision = (E) not known or competent.

GROSS, COMMON IN (E) *i. e.*, a right of common which is not appendant or appurtenant to the land, but is annexed to the person = (S) not used; personal right like a right of servitude disjoined from the dominant tenement.

GROUND ANNUAL (S) *i. e.*, an estate created in land by a vassal, who, instead of selling his land for a gross sum, reserves an annual ground-rent from the vendee = (E) a rent charge, which is however granted by the owner to a third person, the owner retaining the land, 265.

——— ANNUALER (S) or creditor in the ground-annual = (E) owner of rent-charge, 265.

——— LANDLORD (E) *i. e.*, landlord entitled to ground rent or chief rent = (S) landlord; or if a feu, superior.

——— RENT (E) *i. e.*, originally the rent payable by a person who builds on another's land. It is a primary debt, and the goods of the tenants, whoever they are, may be distrained by the ground or chief landlord = (S) rent; also feu-duty in building feus, 385, 411.

GROUNDS AND WARRANTS (S) *i. e.*, in actions of reduction = (E) charges in a bill to set aside.

GROWING CORN, distress on, by landlord, 409.

GUARANTEE (E) = (S) cautionary obligation; contract must be in writing, 620; new surety introduced, 621; discharge of guarantee, 622; discharge of one of several sureties, 623; limitation of action against, 624.

GUARDIAN (E) = (S) of a child under 12 or 14, tutor; of child above 12, or 14 to 21, curator; of insane person, curator or tutor, or guardian.

——— OF THE POOR (E) = (S) managers of the poor or parochial board.

GUILD, DEAN OF (S). *See* "Dean" = (E) not known; in London, surveyor.

HABEAS CORPUS ACTS (E) *i. e.*, certain statutes 31 Ch. II. c. 2; 56 Geo. III. c. 100, under which a person illegally imprisoned or detained can have the legality of his custody determined by a court of law = (S) the corresponding Act is 1701, c. 6.

——— AD SATISFACIENDUM (E) a writ by which a person already in prison is charged in execution for another debt = (S) not used.

——— AD TESTIFICANDUM (E) *i. e.*, the writ for bringing up a prisoner to a court or trial to give evidence as a witness = (S) warrant to produce a prisoner, 1090.

HABENDUM (E) = (S) clause of destination, and clause of duration, 361; in lease, 377.

HABERE FACIAS POSSESSIONEM (E) *i. e.*, the writ of execution whereby the plaintiff in ejectment after judgment in his favour directs the sheriff to give him possession = (S) precept of ejection or warrant to remove, 425.

HABIT AND REPUTE (S) *i. e.*, a mode whereby the existence of marriage between a man and woman may be proved, or inferred from cohabitation and habit and repute = (E) reputed or notorious; marriage cannot be constituted in (E) by habit and repute, though in cases where strict proof is not required, it is admissible evidence to go to a jury, 861.

HÆREDITAS JACENS (S) *i. e.*, the estate of a deceased person, before the heir has taken it up by service = (E) not known; because it vests instantly in the heir-at-law, 779.

HAMESUCKEN (S) the offence of feloniously assaulting a man in his own dwelling-house, the punishment of which formerly was death = (E) assault upon a person in his own dwelling-house; it makes no difference that the assault was in the dwelling-house of the assaulted, except so far as relates to self-defence.

HAMLET (E) *i. e.*, a small village, being part of a parish = (S) not used.

HANAPER OFFICE (E) *i. e.*, one of the offices in Ch. for issuing writs = (S) not used.

HANDFUL, OR HANDHIGH (E) is 4 inches in measuring horses.

HASP AND STAPLE (S) *i. e.*, a form of entering heirs in certain burghs, the bailie making the heir take hold of the hasp and staple of the door by way of possession, 10 & 11 Vic., c. 49 = (E) not known.

HAVER (S) = (E) one who holds the custody of documents.

HEADBOROUGH (E) a high constable having certain duties in the hundred = (S) not known.

HEARING IN PRESENCE (S) *i. e.*, a hearing of an important case by all the judges of both Divisions and the Lords Ordinary = (E) not known, and not competent; but the court of Criminal Appeals applies in some respects to criminal cases. In Ch. a V. C. can call in the assistance of a C. L. judge.

HEARSAY EVIDENCE OF DEAD WITNESS, 986, 1097.

HEATH, BURNING OF (E) = (S) muirburn.

HEIR (S) = (E) heir-at-law, also next of kin.

——— AND EXECUTOR (S) as a head of law = (E) "real and personal" is the head of law; also heir-at-law, or executors and administrators respectively.

——— APPARENT (E) *i. e.*, he who will certainly succeed, if he survive his ancestor = (S) generally called heir-presumptive, 753.

——— APPARENT (S) *i. e.*, he who is heir-at-law, but has not made up his titles = (E) included in heir-at-law, 752.

——— AT-LAW (E) *i. e.*, he who succeeds to real estate, if there is no will = (S) same; often called heir, which also includes next of kin; is one of next of kin, 740.

——— BY DESTINATION (S) = (E) devisee or heir of devisee, who takes *per formam doni.*

——— OF ENTAIL, INSTITUTE (S) = (E) donee in tail.

——— SUBSTITUTE (S) = (E) remainderman.

——— OF ENTAIL IN POSSESSION (S) = (E) tenant in tail in possession.

——— OF LINE (S) = (E) lineal heir.

——— OF PROVISION (S) = (E) donee in tail, or one taking *per formam doni.*

HEIRES (E) *i. e.*, a female heir = (S) heir female.

HEIR-LOOM (E) = (S) included in heirship moveables, 712.

HEIRS PORTIONERS (S) = (E) coparceners; eldest entitled in (S) to mansion-house, 166, 777; and to title-deeds, 166, 777; division among, 165-6, 777.

HEIRSHIP MOVEABLES (S) = (E) some of these are called heir-looms, and others are not specially named, as title-deeds, etc, 712.

HERALDS, Kings-at-Arms (E) = (S) same; officers of Lord Lyon.

HEREDITAMENT (E) = (S) heritable subject.

HEREZELD (S) obsolete = (E) heriot in copyholds, not obsolete.

HERIOT (E) *i.e.*, the best beast or chattel belonging to a deceased copyholder, which the lord of the manor can sometimes claim, 181 = (S) formerly herezeld, not known as a casualty of superiority; but as between heir and executor of a person who dies seised in land, heirship moveables, 712.

HERITABLE BOND (S) = (E) bond to A and his heirs.

——— AND MOVEABLE (S) = (E) real and personal; but the terms do not coincide entirely, 715.

——— SECURITIES (S) = (E) real securities, as mortgages, registered judgments, rentcharges, etc.

——— SUCCESSION AB INTESTATO (S) = (E) descent, 751; heir-at-law, 751.

HERITOR (S) *i. e.*, those proprietors are so called, who pay public burdens = (E) landowners, 1002.

HERSHIP OR DEPREDATION (S) *i.e.*, the driving away of cattle by an armed force = (E) no special term; stealing cattle.

HIDE (E) *i. e.*, an old land measure of 100 or 120 acres; obsolete.

HIDEL (E) *i. e.*, place of protection or sanctuary; obsolete = (S) sanctuary.

HIGHWAY, SOIL OF, belongs to adjacent owner in (E) 12; *contra* in (S) *ib.*

HILARY TERM (E) *i. e.*, one of the four terms or periods for the sitting of the courts of law in banc, beginning 11th, and ending 31st January = (S) not used; winter session, 1056.

HINC INDE (S) *i. e.*, on both sides, as claims *hinc inde* = (E) mutually or reciprocally.

HIRING, negligence of hirer, 606; of servants, 825, 828.

HOLDEN AND REPUTED (S) doctrine of = (E) no short term; but an officer or magistrate acting as such, is presumed to be properly appointed and to do his duty, and act within his jurisdiction.

HOLDING (S) *i.e.*, the modern holdings are *feu*, *blanch*, and *burgage* = (E) tenures. *See* "Tenures."

——— A SE VEL DE SE (S) *i.e.* = (E) not known. *See* "Copyhold."

——— BASE. *See* "Base."

——— BLANCH (S) or blanch holding = (E) petit sergeanty, 15.

——— BURGAGE (S) or burgage holding = (E) not known, 15.

——— FEU (S) or feu holding. *See* "Feu."

——— MORTIFICATION (S) = (E) tenure in frankalmoign, 12.

——— OVER A TERM (E) = (S) no term, but in like circumstances tacit relocation arises, 421.

——— PUBLIC. *See* "Feu."

——— WARD (S) wardholding is abolished, but where held of the Crown, it is converted into blanch holding, and where of a subject superior, into feu holding, which titles see.

HOLIDAY, in bills of exchange, 562.

HOLOGRAPH (S) deed or writ, *i. e.*, written by the subscriber's own hand = (E) no term; and a deed or will written by the subscriber must be executed like other deeds and wills. In mercantile matters, writings in the party's own hand merely facilitate the proof; prescription on, 489; deeds, 351; wills, 668.

HOLY ORDERS (E) = (S) license to preach, after which the holder of the license is called a licentiate or probationer, 993.

HOLYROOD HOUSE (S) *i. e.*, the Queen's Palace, the buildings adjacent to which are a sanctuary for debtors = (E) like Queen's Palace, within verge of which debtors cannot be arrested for debt, 1127.

HOMAGE (E) *i. e.*, a court consisting of the copyholders of a manor, 184 = (S) the old *pares curiæ* (obsolete).

HOMICIDE (S) = (E) same.

———, CULPABLE (S) = (E) includes excusable homicide and manslaughter.

——— BY MISADVENTURE (E) = (S) included under excusable homicide.

HOMINE REFLEGIANDO (E) is a writ to bail a man out of prison, superseded by *habeas corpus.*

HOMOLOGATE (S) = (E) to confirm, or act on the faith of.

HOMOLOGATION (S) *i. e.*, conduct rendering a deed or writing, which has been imperfectly executed, binding on one of the parties = (E) part performance or estoppel in pais. A deed not well executed would not be set up on that ground in a court of law; but a court of equity would in some cases hold it binding, or direct a conveyance to be executed according to circumstances.

HORNING (S) *i. e.*, a charge to pay a debt or perform an act under a decree = (E) not necessary at C. L.; in Ch., service of decree, 1123, 1160.

HOSPITAL (S) *i. e.*, an institution, or mortification, founded for the education and maintenance of children = (E) charity; but hospital is also sometimes used.

HOTCHPOT (E) *i. e.*, where one of several younger children has received an advancement out of the father's personal estate, it must be brought into hotchpot before such child can claim under the Statute of Distributions = (S) collation, 741.

HOUGHING OF CATTLE (S) = (E) maiming or wounding cattle.

HOUSE OF LORDS; jurisdiction, 1043; judges, 1044; precedence of counsel, 1045; judgment, 1046; costs on reversal, 1047.

HOUSEBOTE (E) *i. e.*, wood for repairing house allowed to tenants = (S) no term, 64.

HOUSEBREAKING (S) = (E) same; also larceny in a dwelling-house, if in day time; if committed between an hour before sunset and an hour before sunrise, *Burglary.*

HOUSEBURNING, or ARSON (E) = (S) fire-raising.

HOUSEHOLDER (S) = (E) the same; also housekeeper.

HUE AND CRY (E) a pursuit of a felon upon felony committed, which it is the duty of all to join in; and if a bystander take the felon, he has the same privileges as if acting under a magistrate's warrant. A man may be fined for wantonly raising the hue and cry = (S) not used.

HUNDRED (E) *i. e.*, an ancient subdivision of a county still kept up, one of the incidents of which is, that if damage has been done by rioters, the party injured may proceed before the justices, and if the damage exceed £30, by action at law recover compensation against the hundred, 5

& 6 Vic., c. 97, § 5; 7 & 8 Geo. IV., c. 31. The writ is served on the high constable of the hundred, and the amount must be paid by the hundredors, or inhabitants, a rate being made for the purpose = (S) not known; but damages may be recovered by the party damaged by riots, against the county or burgh.

HUNDREDORS (E) men of a hundred, or inhabitants thereof = (S) not known.

HUSBAND AND WIFE (S) = (E) same, formerly called "baron and feme." *See* "Marriage," 858, *et seq.*

HYPOTHEC (S) = (E) not used, a lien with or without possession, 594. Hypothecation is, however, used in mortgage of ships.

——— FOR RENTS (S) = (E) not known, there being only a right of the landlord to distrain, 407.

——— MARITIME (S) = (E) maritime lien.

——— ON CROP, 406.

——— ON INVECTA ET ILLATA (S) = (E) not known, except as a power to distrain, which applies to all goods found on premises, 409.

——— OF LAW AGENT (S) = (E) lien of attorney or solicitor over papers and monies of his client, 1223.

IDEM SONANS (E) *i. e.*, if at C. L. a party has been served with process where there is a slight mistake in the name, but they sound the same, there is no irregularity = (S) not used.

IDIOT (S) also called a fatuous person = (E) idiot.

IDIOTRY (S) *i. e.*, state of an idiot = (E) idiocy.

IGNORAMUS (E) *i. e.*, the indorsement of a grand jury on a bill of indictment signifying that there is no *prima facie* case against the person charged, now called "no true bill" = (S) not known, there being no grand jury; but a public prosecutor discharges like duties, 957.

ILLUSORY APPOINTMENT (E) = (S) illusory exercise of a faculty, 294.

IMBECILITY (S) *i. e.*, a weakness of mind serving as a ground for protection by law = (E) no term. But it may be an ingredient in Ch. to set aside deed for fraud, 802.

IMPEACHMENT OF WASTE, WITHOUT (E) where a tenant for life takes his estate for life without impeachment of waste, he can commit what waste he pleases, subject to certain qualifications in equity = (S) no short term used, the powers of a liferenter being determined by the terms of the deed, 66.

IMPERTINENCE (E) a term used as to pleadings or interrogatories in Ch., and also at C. L. for matter introduced which is irrelevant, and which may be struck out at the expense of the party so pleading = (S) not used; but substantially the same rule applies, though it is not so strictly enforced, 1077.

IMPLEMENT (S) = (E) specific performance. It is in general competent only in Ch.; to "sue for implement," is to file a bill to compel specific performance. Courts of C. L. can in general only give damages for breach of contract, covenant, etc., 483, 484; in contract for goods sold, 535.

IMPLICATION (E) = (S) same.

IMPLIED DISCHARGE AND RENUNCIATION (S) = (E) presumption of payment.

——— WARRANDICE (S) = (E) implied warranty.

IMPOTENCY (S) = (E) same.

IMPOUNDING A DOCUMENT (E) *i. e.*, where a judge orders a document, used in

proceedings before him, which he suspects to be forged, to be kept till a prosecution is ordered = (S) not used; but document ordered to be retained by the clerk of court.

IMPOUNDING cattle damage feasant (E) = (S) poinding of cattle trespassing.

IMPRESSING OR IMPRESTING, *i. e.*, paying earnest to seamen (E) = (S) the same.

IMPREST MONEY, paid on enlistment of soldiers; or press-money.

IMPRISONMENT (S) *i. e.*, in both civil and criminal cases = (E) not a technical term; arrest is used in civil cases, and apprehension in criminal cases.

IMPROBATION (S) *i. e.*, voiding an instrument as false and forged, which is done by an action of reduction-improbation = (E) setting aside for fraud, 1150.

IMPROBATORY ARTICLES (S) *i. e.*, the grounds on which reduction is sought = (E) like parts in a bill in equity, called the charging part.

IMPROPRIATION. *See* "Appropriation."

IMPROVING LEASE (S) = (E) building and repairing lease as to house.

IN ARTICULO MORTIS (S) *i.e.*, on deathbed.

IN AUTRE DROIT (E) *i. e.*, in another's right, as where executors or administrators sue for a debt, etc., in right of the testator or intestate = (S) no term, but the deceased is said to be the author of the executor nominate.

INCARCERATE (S) = (E) take the debtor's person in execution under a ca. sa.

INCENDIARY LETTER (S) = (E) included under threatening letter.

INCIDENT DILIGENCE (S) *i. e.*, diligence to compel attendance of witnesses, of parties to be examined as witnesses or havers, etc. = (E) no term, each step being separately named, as subpœna which is the process for witnesses; a rule of court to examine a party orally or on interrogatories; commission to examine witnesses abroad, etc.

INCIPITUR (E) *i. e.*, commencement of a judgment entered on the roll at C. L. = (S) not used.

INCLOSURE (E) *i. e.*, the subdivision of a common = (S) division of a common or of commonty.

INCORPORATIONS (S) = (E) *corporations.*

INDEBITI SOLUTIO (S) *i.e.*, the payment by mistake of what was not due, recovered by an action called *condictio indebiti* = (E) not used; money so paid is recovered by the action for money had and received, 453.

INDEBITATUS ASSUMPSIT (E) the action to recover a debt under an allegation that the party owed the debt and promised to pay it = (S) action to recover a debt, 1058.

INDECENT PRACTICES OR EXHIBITIONS (S) = (E) indecent exposure, etc.

INDEFINITE PAYMENT (S) *i. e.*, as a head of law = (E) appropriation of payments.

INDEMNITY, DEED OF (E) = (S) bond of relief.

INDENTURE, OR DEED OF (E) *i. e.*, a deed, to which there are two or more parties with mutual covenants = (S) deed, 333.

INDICTMENT (S) = (E) the same in criminal cases, 961.

INDIVISIBLE (S) = (E) joint or held in common.

INDUCIÆ LEGALES (S) *i. e.*, the time intervening between the citation of a defender and the time for his appearance = (E) time for entering appearance, or complying with some order of court; in other cases, return of the writ.

INDUCTION OF A CLERGYMAN (S) = (E) the same.

INDUSTRIAL ACCESSION (S) = (E) no term; as to chattels, work and labour expended upon them.

——— FRUITS (S) = (E) emblements; right of liferenter to, 68.

INFANT (E) *i. e.*, one under 21 = (S) subdivided into pupil, *i. e.*, under 12 if male, or 14 if female; and minor, *i. e.*, from 12 or 14 to 21; cannot make a will, 671, 812; who are, 805; contracts of, 806; for necessaries, 807; father's liability for, 808; contracts not for necessaries, 809; infant in trade, 810; deeds of infant, 811; ratification of contracts by, 813; disaffirming contracts, 814; defence of infancy, 815; recovering back money paid, 816; misrepresentation, 817; sues in its own name, 818; guardian of, 819; marriage of, 866; a witness in criminal cases, 974.

INFEFTMENT OR SASINE (S) *i. e.*, the act of giving symbolical possession of heritable property. It is essential to the completion of the title of the owner, for without it he has only a personal title to the land, and is under many disadvantages. Infeftment used to be by a separate act or process, at which a notary was present; but now, if the conveyance is recorded in the register of sasines, the same effect is produced = (E) livery of seisin in freeholds; in copyholds, admittance, 187; is test of priority, 187 *n.*

——— IN SECURITY (S) *i. e.*, the kind of infeftment taken by a heritable creditor (mortgagee E) in the land = (E) no seisin is necessary, 93.

——— OF RELIEF (S) *i. e.*, that kind of infeftment given to a cautioner infeft in the lands in security = (E) no seisin necessary; indemnity.

INFORMATION (E) *i. e.*, a Crown information charging a party with some misdemeanour. It is also called an *ex officio* information if filed by the Attorney-General = (S) criminal letters, 959.

——— (E) *i. e.*, the complaint made before a J. P., with a view to charge a person with a crime. If a warrant to apprehend is applied for, the information must be in writing; if only a summons calling on the accused to appear, it may be verbal = (S) complaint.

——— (E) *i. e.*, in Ch., the pleading by which Attorney-General institutes suits for charities = (S) not used; an ordinary action of declarator, etc., is raised.

INHIBITION AGAINST A WIFE (S) *i. e.*, a writ informing the public that the wife has no authority to bind the husband = (E) not known, but husband may give notice to particular tradesmen, and the effect as to them will be the same, 898.

——— (S) *i. e.*, a writ prohibiting a debtor alienating his heritage to the prejudice of the creditor inhibiting; such writ must be recorded in the register of inhibitions = (E) not known, 1134.

INHIBITIONS, REGISTER OF (S) see last note.

INITIAL EXAMINATION OF WITNESS (S) = (E) "examination on the *voir dire.*"

INJUNCTION (E) an injunction is said to be dissolved, when it is at an end = (S) interdict. An interdict is said to be recalled.

IN LECTO, DEEDS GRANTED (S) *i. e.*, deathbed deeds = (E) not known, because they are as competent on deathbed as at any other time, 675.

INNER HOUSE (S) *i. e.*, two courts of co-extensive jurisdiction, part of the Court of Session, entertaining reclaiming petitions from the Lords Ordinary, who constitute the Outer House = (E) superior courts of law and equity, the former sitting in banc, 1056.

INNER TEMPLE (E) *i. e.*, one of the four inns of court having power to call persons to the bar = (S) Faculty of Advocates, 1209.

INNOVATION OR NOVATION OF OBLIGATIONS (S) *i. e.*, taking a fresh security = (E) release by taking a fresh security, which, however, is only implied when a higher security is taken, as a bond for a bill of exchange, 437.

INNS OF CHANCERY (E) *i. e.*, minor inns belonging to the four larger inns, formerly used for students.

——— OF COURT (E) *i. e.*, four societies, called the Inner Temple, the Middle Temple, Lincoln's Inn, and Gray's Inn, having the exclusive power of calling persons to the bar. The term "Inn of Court" is also used to denote the locality or buildings belonging to the Inn, which are almost exclusively used by barristers-at-law as chambers or places of business = (S) Faculty of Advocates. The advocates do not in practice confine their chambers to any particular locality, 1209.

INNUENDO (E) *i. e.*, that part of a pleading in libel cases explaining at large what is only hinted at or implied in the libel = (S) not used.

INQUEST, CORONER'S (E) = (S) not known; the procurator-fiscal in like cases, if suspicious, makes a private *ex parte* inquiry, 959.

INQUISITION (E) *i. e.*, the return made by a sheriff as to the amount of damages assessed, or other matter to be inquired into = (S) not used, except under special statutes.

INQUIRY, WRIT OF (E) at C. L.; if a defendant allows judgment to go by default, and the damages are unliquidated, a further writ, called a writ of inquiry, must be sued out to the sheriff of the county, whose under-sheriff, with a jury, assesses the damages due = (S) not known.

INSANITY OR LUNACY (E) = (S) same; also furiosity, 800.

INSENSIBLE (E) *i. e.*, a pleading or part of a statute is often said to be insensible when no rational construction can be put upon it = (S) not used; unintelligible.

INSOLVENCY (E) *i. e.*, when used technically, confined to those cases where persons (who are not traders, and cannot be made bankrupts) have been made insolvents under the Insolvent Debtors' Act = (S) *cessio bonorum*, also sequestration; there being no distinction between traders and non-traders, 1174, 1186.

INSOLVENT DEBTORS' COURT (E) the court which adjudicates on the cases of insolvent persons, and releases them from imprisonment, or prevents the necessity of imprisonment on certain terms. The head court is in London, and has jurisdiction over the metropolis and counties adjoining. Other cases in the country are disposed of by the County Court judges, who are also judges of the Insolvent Court = (S) Sheriff Court, which awards sequestration, and also entertains petitions for *cessio bonorum* under 6 & 7 W. IV. c. 56, 1174, 1186.

INSPECTION (E) of property, or *locus in quo* by the jury previous to trial, which either party may move for = (S) not used technically.

——— OF DOCUMENTS (E) *i. e.*, the examination of documents in the custody of one party by his opponent = (S) examination under diligence to cite havers; also action of exhibition, 1084, 1100, 1156.

INSTITOR (S) *i. e.*, manager = (E) agent, servant, or manager, as the case may be.

INSTITUTE (S) *i. e.*, the person to whom an estate is first given in a destin-

ation, the rest being called substitutes = (E) no general term; donee in tail; legatee.

INSTITUTE AND SUBSTITUTE IN ENTAILS, 42, 44.

INSTITUTION (E) the admission by the bishop of a clerk who has been presented to a church living = (S) admission.

INSTRUCT A TITLE (S) = (E) establish or make out a title.

——— COUNSEL (S) = (E) same.

INSTRUMENT OF PROTEST (S) = (E) protest.

——— OF SASINE (S) = (E) not known, there being no separate document required setting forth livery of seisin, 359, 363.

INSTRUMENTARY WITNESSES (S) = (E) attesting witnesses.

INSTRUMENTS (S) term applied chiefly to notarial instruments = (E) term is chiefly confined to wills and testamentary writings.

INSUCKEN MULTURES (S) = (E) payments under custom or covenant to do suit to a will, 290.

INSUFFICIENCY (E) *i. e.*, in Ch. an answer which does not specifically reply to specific charges in the bill = (S) not a technical term, though often used in a like sense.

INSURANCE; assignment of fire policy, 585; condition precedent to right of action, 586; floating policy on goods in trust, 587.

INTERDICT (S) an interdict is recalled when the purpose is effected = (E) injunction. An injunction is dissolved when the purpose is effected.

INTERDICTION (S) *i. e.*, a bond by a weak-minded person binding himself to execute no deed of conveyance without consent of certain persons called interdictors = (E) not known; but he may convey to trustees, 802.

INTERESSE TERMINI (E) *i. e.*, the executory interest which a lessee acquires by his demise before he enters = (S) not used.

INTEREST, on debts generally, 482; on bills of exchange, 565; on legacies, 706; on judgment debts, 482; on mortgages, 98.

INTERIM DECREE (S) = (E) interlocutory decree, order, or judgment.

——— EXECUTION (S) *i. e.*, when a decree or interlocutor has been appealed to the House of Lords, the successful party may apply for interim execution, which may be granted on caution being found = (E) not used; execution, 1048.

——— FACTOR (S) *i. e.*, in sequestrations a person appointed to manage the estate till a trustee is appointed = (E) official assignee in bankruptcy and insolvency, 1175, 1187.

——— POSSESSION (S) *i. e.*, possession of a disputed subject regulated by a sheriff during an advocation of the cause to the Court of Session = (E) also used.

——— WARRANT (S) *i. e.*, a warrant to divide part of the price in a ranking and sale, without waiting for the sale of the remainder of the property = (E) order of distribution.

INTERLINEATIONS, etc., in a deed, 348; in a will, 666.

INTERLOCUTOR (S) = (E) at C. L., order, or rule, or judgment final or interlocutory. In Ch. order or decree, final or interlocutory.

INTERLOCUTORY JUDGMENT (E) *i. e.*, a judgment requiring something further to be done before final judgment; so interlocutory decree = (S) interlocutor or interim decree.

INTERPLEADER, BILL OF (E) *i. e.*, a bill in Ch. by one who claims no right

in a fund in preference to those against whom the bill is exhibited; and he prays the court to decide the rights of those persons. When the court makes a decree that the defendants do interplead, the plaintiff withdraws from the suit = (S) an action of multiplepoinding in which the raiser or pursuer asks that the parties may debate their respective claims. The claimants then give in condescendences, which are answered by the other claimants. On a decree of exoneration, the raiser has no further interest in the action.

INTERPONING THE AUTHORITY OF THE COURT (S) as, for example, to a minute of judicial reference = (E) making such an order a rule of court, 1202.

INTERROGATING A PRISONER, 952.

INTERROGATORIES (E) = (S) the same; but the term is confined to those used in commissions to examine witnesses, 1082, 1093.

INTERRUPTION (S) *i. e.*, an act which arrests the progress of prescription = (E) not used; an act which takes the case out of the Statute of Limitations or Prescription.

INTERVALLO, EX (S) = (E) after a long interval or delay, as opposed to *de recenti* (S) within a reasonable time (E).

INTERVENTUS, REI (S) = (E) part performance. *See* "Rei Interventus."

INTESTACY IN PERSONAL ESTATE (E) = (S) moveable succession *ab intestato*, 733. *See* "Executors and Administrators," "Statute of Distributions," 734.

——— IN REAL ESTATE OR DESCENT (E) = (S) heritable succession *ab intestato*, 751.

INTIMATION (S) = (E) notice; service of notice in assigning debts, 476, 1254; in selling goods in hands of third party, 529; on the walls of court (S) = (E) sticking up a notice in the offices of court.

INTROMISSION (S) *i. e.*, the interfering with the property of another, as if it were one's own, and with or without any legal title = (E) not used; dealing with.

——— VITIOUS (S) = (E) conduct of executor *de son tort* as to personal estate, 695.

INTROMIT (S) = (E) not used; interfere or intermeddle with.

INTRUSION (S) *i. e.*, taking possession of a benefice without being regularly admitted = (E) not known; but the term is used as to freehold estates.

INVADING A JUDGE (S) = (E) assaulting a judge.

INVECTA ET ILLATA (S) *i. e.*, things brought by a tenant on the premises let etc. = (E) all goods found on the premises; the landlord may in general distrain all that he finds, 409.

INVENTORY OF EXECUTOR (S) = (E) same in Probate Court.

——— OF TITLES OR WRITS (S) *i. e.*, a list of title-deeds sent by a vendor to the vendee = (E) an abstract of title. Owing to the want of a general register of deeds in E., an "abstract of title" is much more copious than an inventory in S.; and in fact is an abridgment, with copious extracts, of all the essential parts of the titles, 323.

——— OF PROCESS (S) *i. e.*, a correct list of the articles of which a process consists, specifying the dates of the productions (exhibits E). This inventory and the productions are kept by the clerk of the court, who lends them alternately to either party when required = (E) not known at C. L.; the papers and documents in actions are always kept in the hands of the parties themselves or their attorneys, and not given into

court, 1084. In Ch., however, they are sometimes inventoried and left with the clerks of records and writs, 1156.

INVENTORY FOR SECURITY OF HEIRS (S) = (E) not needed as to real estate, 781; as to personal, the executor makes an inventory of the estate.

INVESTITURE (S) *i. e.*, the completed possession given to a vassal, under a charter and recorded sasine, without which no feudal right to land is perfect = (E) not used.

IRREGULARITY (E) *i. e.*, some act done by one of the parties during the progress of an action or suit which is irregular, and may be set aside, with costs, if the other party apply promptly. If the other do not apply promptly, or takes the next step, he waives the irregularity, and it can no longer be set aside. An irregularity differs from a nullity, which cannot be waived = (S) not used technically.

IRRELEVANT (S) = (E) demurrible, or bad on demurrer.

IRRITANCY (S) an irritancy is said to be purged by the tenant when he gets over it = (E) forfeiture; a forfeiture is said to be waived, *i. e.*, by landlord.

——— LEGAL OR CONVENTIONAL (S) = (E) forfeiture at common law or under terms of a covenant.

——— OF A FEU (S) 179 = (E) escheat of copyhold estate, 183.

——— OF LEASE (S) = (E) forfeiture of lease, which is generally accompanied with a proviso for re-entry, 426.

——— OF LEASE, DECLARATOR OF (S) = (E) in freehold leases, ejectment for forfeiture, under a proviso for re-entry; in leases for years, an action of ejectment is also necessary, for, though the lease is void *ipso facto*, yet ejectment is necessary to get the possession, 426.

IRRITANT AND RESOLUTIVE CLAUSE IN ENTAIL (S) = (E) clause of forfeiture, and gift over; effect of in entail, 28, 32.

ISH (S) = (E) termination of a lease.

——— AND ENTRY (S) clause of = (E) the clause in these words, "also all ways, paths, passages, etc., to the premises belonging" part of the parcels; clause in a lease.

ISSUABLE PLEA (E) *i. e.*, a plea which may be directly replied to by taking issue = (S) not used.

ISSUE (S) *i. e.*, issue of fact to be tried by a jury = (E) the same. There are also issues in law raised by demurrer. The parties are said to join in issue in both cases.

——— OF BODY, in estate tail, 30; words "dying without issue," in wills, 704.

——— PURSUER OF (S) *i. e.*, party entitled to begin at the trial; always appointed at the time, when the issues are settled = (E) the party having the right to begin at the trial, who may be the defendant, according to circumstances. The parties settle the issue themselves, but not the right to begin, which is settled by the judge when the trial begins, 1088.

JACTITATION OF MARRIAGE (E) *i. e.*, where a party boasts or gives out that he or she is married to another, raising thereby a common reputation of marriage, a suit of jactitation of marriage in the Divorce Court can be instituted by the other, and if the party so boasting cannot prove an actual marriage, he or she is enjoined perpetual silence on that

head thereafter = (S) action of declarator of putting to silence, 1 Fraser, D. R., 710.

JAIL-BREAKING (S) = (E) breach of prison.

JEDGE AND WARRANT (S) *i. e.*, the authority given by the Dean of Guild to rebuild or repair ruinous tenement = (E) not known; but in the metropolis the surveyor of metropolitan buildings takes similar proceedings.

JEOFAILS, STATUTE OF (E) a statute which enabled courts of C. L. to amend mistakes or misprisions of officers of the court in making up the record, etc. The power is now much extended = (S) there is no general statute.

JOINDER OF ISSUE (E) *i. e.*, the stage in an action at which the parties differ directly on a question of law or fact, and join issue. A joinder in an issue of law is generally called a demurrer = (S) the court settles or approves the issues for the parties, and the issues are then ordered to be tried before a jury, 1079.

——— OF PARTIES (E) *i. e.*, where a party is sued, the defendant may plead in abatement the nonjoinder of other parties, either as co-plaintiffs, or co-defendants = (S) proper parties not called, 1073.

JOINT AND SEVERAL (E) = (S) the same; also conjunct and several.

——— CONTRACT, 627; joint creditors, 628; survivorship, 630; want of proper parties, 631; joint debtors, 632.

——— OBLIGANT (S) = (E) joint debtor or obligor.

——— OWNER (S) = (E) tenant in common, companion in tenancy in common.

——— in land, 157; division of ownership, 160; no survivorship, except by express words, 161; heirs-portioners, 164; destination to joint owners, 172 *n.*

——— TENANCY (E) = (S) included in common property; no term, except by detailed description, as joint owner with right of survivorship. Thus, conveyance to "A and B jointly, and the survivor and their heirs," would be in (E.) a "joint tenancy;" of an estate of inheritance, 172; estates, 154; tenancy, 156, 157; alienation by joint tenant, 159; joint tenant severing, 160; survivorship, 161; limitation of joint estate, 171; of joint tenancy in fee, 172.

——— TRADE OR ADVENTURE (S) also partnership = (E) joint adventure.

JOINTRESS (E) *i. e.*, one who has a jointure = (S) sometimes used; widow who has a provision.

JOINTURE (S) or provision for wife out of heritable property of the husband = (E) jointure, 924.

JOURNEYS ACCOUNTS (E) an old writ, whereby a suit, which abated by death, was continued, now superseded by revivor and suggestion of death, but not abolished. *See* Wms. Exrs., 1706 = (S) transference.

JUDGE ORDINARY (S) *i. e.*, the local judge, the sheriff = (E) not used. The ordinary of the district, generally the bishop, is used only in ecclesiastical law.

JUDGMENT (S) = (E) the same, but confined to C. L. procedure; in Ch. called a decree.

JUDICATUM SOLVI (S) caution, *i. e.*, to pay the debt = (E) bail, or special bail to pay the debt, confined to cases where defendant has been arrested, but the bail will be discharged by rendering their principal, 1140.

JUDICIAL DECLARATION (S) *i. e.*, a statement by a party in the cause not on oath = (E) not used.

JUDICIAL EXAMINATION (S) *i. e.*, examination of a party by the court and generally not on oath = (E) not known; except on oath, 1082, 1100.

——— FACTOR (S) *i. e.*, an officer named by the Court of Session *ex nobili officio* to protect minors, absent parties, and lunatics, trusts which have failed, etc.; also called factors = (E) a receiver as to property has less power, while a trustee appointed by the Court of Chancery in (E), has more power than the judicial factor in (S). *See* "Factor."

——— RATIFICATION OF DEEDS BY MARRIED WOMEN (S) = (E) acknowledgment of deeds, 886, 887.

——— REMIT (S) = (E) at C. L., order of reference under rule of court. In Ch. reference to the chief clerk at chambers, or to an accountant or other person.

——— SALE (S) any sale ordered by the Court of Session in course of a proceeding, as sale of heritable estate of an insolvent person to be divided among his creditors, a sale under bankruptcy, etc. = (E) sale by order of court in Ch. 111; at C. L. a sale by sheriff of goods taken in execution is the only way in which the court can order a sale.

——— SEPARATION (E) formerly divorce *a mensa et toro* = (S) judicial separation, 878; wife's earnings, 879; wife is *feme sole*, 880.

JUDICIO SISTI (S) caution, *i. e.*, to enforce the appearance of a party to abide the decree or order of the court = (E) bail to render their principal, confined as above 1140. *See* "Judicatum Solvi."

JURAT (E) *i. e.*, the part of an affidavit stating before whom it was sworn, and by what authority the commissioner, etc., acted = (S) not used.

JURATORY CAUTION (S) where a party gives the best caution which he can offer, viz., an affidavit of his means and estate, and a conveyance thereof in security, this is called juratory caution. It is chiefly used in advocations = (E) one often enters into his own recognisance, as, for example, to prosecute or attend a criminal trial, but there is no conveyance. In appeals, security is generally required from third parties.

JURISDICTION (S) = (E) same; over foreigners, 1058, 1061, 1241.

——— PLEA TO THE (E) = (S) included under "preliminary pleas;" plea of "no process," 1073.

JURY (S) in criminal cases consists of fifteen persons, 969.

——— DE MEDIETATE LINGUÆ (E) *i.e.*, a jury half composed of foreigners, which a foreigner when indicted is entitled to demand in criminal cases, 969 = (S) not known and not competent, but *see* "Landed Men."

——— GRAND (E) = (S) not known, 957. *See* "Grand Jury."

——— SITTINGS (S) = (E) sittings at *nisi prius*.

——— TRIALS (S) = (E) trial of causes at *nisi prius*.

JUS ACCRESCENDI (S) = (E) survivorship among joint-tenants, 161, 172, 630.

——— AD REM (S) personal right to lands or moveables = (E) seldom used; chose in action.

———CREDITI (S) *i. e.*, a right of a creditor before payment or performance is exigible = (E) included under chose in action; right of action, or right to sue in equity.

———DELIBERANDI (S) *i.e.*, right of the heir to take a year to consider whether he will take up the succession = (E) not known; because not needed, 779.

——— DEVOLUTUM (S) *i. e.*, right of presbytery to present to a vacant charge,

if the patron fails in six months to present = (E) not used; there is the right of bishop to collate, if patron do not present in time.

Jus in Re (S) or a real right of complete ownership, used both as to heritable and moveable estate = (E) seldom used; both the legal and equitable estate as to real property; as to personalty, the right of ownership, as distinct from special property in the goods.

—— Mariti (S) *i. e.*, the husband's right to administer the goods in communion of the married parties = (E) marital right, which is absolute under some qualifications, there being no such doctrine as that of goods in communion, 882, *et seq.*

—— Preventionis (S) *i. e.*, the preferable right of jurisdiction acquired by one court over other co-ordinate courts, from having exercised the first act of jurisdiction = (E) not used. If a second prosecution, the other pending, in another court were commenced, such court would quash the indictment.

—— Quæsitum Tertio (S) = (E) not used; but in similar cases it is said that the third person was privy to the consideration, etc. See *Peddie* v. *Brown*, 29 Sc. Jur. 388; *Finnie* v. *Glasg.* and *S. W. R. Co.*, *ib.* 537.

—— Relictæ (S) *i. e.*, the share of the widow in the goods in communion on the husband's death, and which he cannot interfere with by will, and which is a half or a third according as there are no children, or there are respectively = (E) not known; except formerly by special custom in city of London and York, 674; but the widow has a share under the Statute of Distributions, which may be defeated by will, 902.

———— cannot be defeated by will, 673, 902.

—— Representationis (S) *i. e.*, the right of the children or descendants to represent a parent who has died before a succession has vested = (E) representation; right of child as representing parent, 739, 747.

—— Tertii (S) *i. e.*, the right of a stranger, who alone has title or interest to interfere = (E) seldom used.

Justice (E) *i. e.*, the name given to Judges of the Courts of Queen's Bench and Common Pleas = (S) not used; Lord of Session.

———Clerk, Lord (S) *i. e.*, the chief judge of the Second Division of the Inner House, and who is president of the Justiciary Court in the absence of the Lord President = (E) Chief Justice.

——— College of (S) *i. e.*, the body of lawyers, viz., judges, advocates, writers to the signet, and solicitors before the Supreme Courts. Its chief privilege is exemption from the annuity tax, a local tax = (E) not known; there is no such body, 1219.

———General, Lord (S) *i. e.*, the chief judge of the First Division of the Inner House, and Chief of the Court of Session and of the Court of Justiciary, 940, 1055.

——— Lord Chief (E) *i. e.*, the chief justice of the Court of Common Pleas.

——— of England, Lord Chief (E) *i. e.*, the title of the Chief Justice of the Court of Queen's Bench = (S) not used; Lord President of the Court of Session, or Lord Justice General.

Justiciary, The High Court of (S) the highest criminal court, which also traverses the country in three circuits, viz., North, South, and West, regulated by 23 Geo. III., c. 45; 20 Geo. III., c. 43; 30 Geo. III.,

c. 17; 9 Geo. IV., c. 29; 11 & 12 Vic., c. 79 = (E) the Assize Court; the Central Criminal Court; also the Queen's Bench, 940.

JUSTIFIABLE HOMICIDE (S) = (E) excusable homicide.

JUSTIFICATION (E) plea of, *i. e.*, a plea justifying an act which is *prima facie* illegal, as imprisoning a person = (S) seldom used, and not technical.

JUSTIFYING BAIL (E) *i. e.*, proving the bail are substantial householders, and possessed of sufficient property, which is done by the bail themselves stating so on oath = (S) attesting the sufficiency of cautioners, generally, by means of third parties called attestors, who are themselves liable *subsidiarie*.

KAIN (S) *i. e.*, poultry stipulated by leases to be delivered by tenant to landlord = (E) covenant in lease to deliver poultry to lessor.

KELP (S) the calcined ashes of sea-ware, either growing on the rocks or found on the sea-shore, 2.

KENNING TO THE TERCE (S) *i. e.*, the process by which a widow, who has been previously served to her terce of lands in which the husband died infeft, has a precise third laid off to her by the sheriff = (E) assignment of dower under an action of dower and writ of dower, 911.

KEYS, QUEEN'S (S) *i. e.*, a writ giving authority to messengers-at-arms to break open outer doors in executing diligence = (E) no term; such authority, however, being implied in writs of *habere facias possessionem*, and in writs in actions at the suit of the Queen; but in ordinary civil actions no court can give the bailiff power to break the outer door, for every Englishman's house is his castle, 1127, 1131.

KIDNAPPING (S) = (E) the same, also forcible abduction of the person.

KIN, NEXT OF (S) = (E) same, 737, *et seq.*

KINDLY TENANT OR RENTALLER (S) *i. e.*, possessors of liferent leases, or leases for life of tenant and his heir (nearly obsolete) = (E) tenants for life or for two lives.

KING'S OR QUEEN'S ADVOCATE (S) *i. e.*, Lord Advocate = (E) Attorney-General, who is, however, not the public prosecutor, 944.

——— OR QUEEN'S BENCH, COURT OF (E) *i. e.*, one of the three superior courts of C. L. = (S) Court of Session, also partly Court of Justiciary, 940, 1055.

——— OR QUEEN'S EVIDENCE (S) = (E) an accomplice giving evidence for the prosecution, 973.

KIRK (S) = (E) church.

——— OR MARKET, GOING TO, (S) *i. e.*, terms denoting sufficient vigour of mind and body to make a deed valid notwithstanding the law of death-bed = (E) not known; there being no such artificial rule, 675.

——— ROAD (S) *i. e.*, servitude by persons going to church = (E) easement or highway for persons going to church.

——— SESSION (S) *i. e.*, a body, consisting of the ministers and elders of the parish church, formerly elected for management of funds for the poor of the parish and for minor discipline of church, but now confined to the latter duty = (E) not known, 995, 1026.

KNAVESHIP (S) payment in meal to miller by tenants of thirled lands = (E) not known, 290. *See* "Mill."

LABES REALIS, OR VITIUM REALE (S) *i. e.*, a flaw or inherent defect in title,

as in the title of a thief to stolen goods, 941 = (E) not used; no right of property or possession.

LACHES (E) or negligence = (S) *culpa;* also *mora.*

LADY DAY (E) *i. e.*, one of the four usual quarter days for the payment of rent, viz., 25th March = (S) not known; the nearest terms are Candlemas, 2d February, and Whitsunday, 15th May.

LADY'S GOWN (S) *i. e.*, a gift sometimes made by a purchaser to vendor's wife on her renouncing her liferent in vendor's estate = (E) not known, 908.

LAMMAS (S) *i. e.*, 1st August; a term sometimes used in leases, etc., for rent = (E) now scarcely known; the term nearest is Midsummer-Day, 30th June.

LANDED MEN, JURY OF (S) *i. e.*, in criminal trials landed men may have a majority of their own class for a jury, 6 Geo. IV., c. 22, § 12 = (E) not known; but aliens may have half of the jury foreigners when tried for crime, 969.

LANDLORD AND TENANT (S) = (E) 373; lease good against reversioners, 373; how far in writing, 374-6; form and clauses of lease, 377; registration of leases, 378; lease must be for term certain, 379; entry of lessee, 380; lease as a mortgage, 381; creditors taking lease, 383; surrender of lease, 384; building leases, 385; building on another's ground, 386; lease goes to executor, 387; implied right to assign and sublet, 388; implied covenant to stock farm, 389; taxes, rates, and assessments, 390; as to repairs, 391; cultivation, 392; fences, 393; improvements, 394; game, hares, rabbits, 395; tenant's right to estovers, 396; emblements, straw, dung, etc., 397; rent, at what time payable, 398; tender of, 468; rent in advance, 400; premium given by lessee, 401; rent in case of fire, 402; set-off against rent, 403; security for future rent, 404; action for rent not privileged, 405; landlord's power of distress, 406; when distress levied, 407; what rent may be distrained, 408; what goods may be distrained, 409; goods in use, etc., 410; goods of strangers, 411; landlord preferred to execution creditor, 412; removal of goods to avoid distress, 413; what debts paid first out of distress, 414, 687; distress how made, 415; distress of cattle, 417; distraining on sub-lessee, 418; liability of sub-lessees and assignees, 419; notice to quit, 420; tenant holding over, 421; notice to quit in yearly tenancies, 423; action of ejectment, 415; proviso for re-entry, 426.

LANDLORD'S HYPOTHEC (S), *i. e.*, a lien of the landlord on the tenant's goods before any sequestration has been used = (E) landlord's power of distress, and also his hold over the goods before distress, which, however, is not a lien, 406.

LANDS CLAUSES ACT (E) *i. e.*, 8 & 9 Vic., c. 18 = (S) the 8 & 9 Vic., c. 19.

LAPSED LEGACY (S) = (E) same 703, 722.

LARCENY (E) the distinction between grand and petty larceny is abolished; compound larceny is larceny from the person, or in a dwelling-house = (S) theft.

LAST HEIR (S) or *ultimus hæres, i. e.*, the Crown as having right to succeed to property where there are no legal heirs = (E) not used; property escheats to the lord or Crown in such circumstances, 3, 21, 182.

—— WILL (S) or testament = (E) will.

LATENT RIGHTS (S) *i. e.*, rights not appearing on the register affecting lands, etc. = (E) not used.

LATITAT, WRIT OF (E) *i. e.*, old writ commencing personal actions (obsolete).

LAVISH PERSONS (S) as to whom interdiction is a remedy = (E) not used; weak-minded persons, 802.

LAWBURROWS (S) letters or warrant of, *i. e.*, a warrant obtained by a person in dread of bodily harm, against another, calling upon him to find caution to keep the peace. The offending party is liable to criminal prosecution for contravention of lawburrows = (E) articles of the peace.

——— CONTRAVENTION OF (S) *i. e.*, in case of the party bound over committing a breach of the peace = (E) the recognisance is estreated, and a process of *scire facias* is competent.

LAW MERCHANT (E) *i. e.*, the law proper to merchants, which in many respects differs from the common law = (S) the same.

LEAD OF AN ACTION (S) or proceedings in a suit = (E) conduct of a cause, carriage of a decree in Ch.

—— PROOF, OR EVIDENCE, TO (S) = (E) to produce evidence.

LEADING A WITNESS (E) *i. e.*, putting questions in such a form to a witness as to suggest the answer required; questions may be so put on cross examination, but not in examining in chief = (S) the same.

LEASE (S) = (E) lease or demise; also term of years, 373, *et seq.* *See* "Landlord and Tenant."

——— by tenant in tail, 50.

——— is heritable, 73; form and clauses of, 377; granted by way of mortgage, 381.

——— AND RELEASE (E) *i. e.*, a form of conveyance of a freehold estate = (S) disposition, 360.

——— IMPROVING (S) = (E) building or repairing lease.

LEASEHOLD ESTATE (E) = (S) same, but seldom used.

LEASEHOLDER OR TENANT (S) = (E) tenant.

LEASING-MAKING OR VERBAL SEDITION (S) = (E) seditious speeches.

LEAVE AND LICENSE (E) a plea to an action of trespass, importing that the plaintiff consented or authorized what the defendant did = (S) not used.

LECTURER (E) *i. e.*, a reader of lectures in a church, chosen by the vestry or chief inhabitants of the parish to assist the rector. He must be licensed by the bishop = (S) not known.

LEET, COURTS (E) *i. e.*, ancient local criminal courts, now superseded by quarter sessions.

LEGACY, general, specific, and demonstrative, 699; legacy to child, 700; lapse of, 701; in substitution, 703; words dying without issue in, 704; general terms in, 705; payment of, 706; suit for, 707; to feme covert, 708, 892; election as to, 709; satisfaction of, by portion, 711; legacy to a witness, 669.

———SPECIFIC (E) = (S) included in special legacy, 699.

LEGAL OR LEGAL REVERSION (S) = (E) equity of redemption of tenant in elegit, 111, 117.

——— DECLARATOR OF EXPIRY OF THE (S) = (E) foreclosure suit by a tenant in elegit, 111.

LEGATEE, SUBSTITUTED (E) *i. e.*, where one legatee is substituted after another = (S) substitute in substitution of legacies; also conditional institute, according to the terms used, 703.

LEGATUM REI ALIENÆ (S) *i. e.*, legacy by the testator of what is not his own

to bequeath = (E) not used; it gives rise to the doctrine of election, 709.

LEGITIM OR BAIRN'S PART OF GEAR (S) *i. e.*, a share which each living child takes in the moveable estate of the father at his death, and which the father cannot interfere with by will = (E) filial portion, or portion natural, or orphanage, which existed, till lately, by special local custom in London and York, etc., but nowhere else. It is abolished even in these places in case of intestates since 1856, 674, 748, 848.

——— advance counted in payment of, 742.

LEGITIMACY, PETITION FOR DECLARATION OF (E) = (S) action of declarator of legitimacy, 842.

LEGITIMATION PER SUBSEQUENS MATRIMONIUM (S) *i. e.*, a bastard is rendered legitimate by the subsequent marriage of his parents = (E) not known, and not competent, 841, 1284.

——— of heir-at-law as to property in (E), 751, 841, 1284; of a child, 841.

LENOCINIUM (S) = (E) same, or collusion or connivance.

LEONINA SOCIETAS (S) *i. e.*, a partnership where one partner has all the loss and another all the gain.

LESION (S) = (E) prejudice or injury to an infant's interests, 814.

LESSEE (S) *i. e.*, the hirer of a moveable subject = (E) bailee.

LESSOR (S) *i. e.*, he who lets out a moveable subject = (E) bailor.

LETHAL WEAPON (S) = (E) deadly weapon.

LETTER OF ATTORNEY (E) = (S) same; also mandate, and commission of factory.

——— OF GUARANTEE (S) = (E) guarantee.

——— MISSIVE (E) citation of a peer of the realm to appear in a suit in court = (S) not used.

LETTERS (S) *i. e.*, a general name of writs = (E) writ.

——— OF ADMINISTRATION (E) = (S) confirmation of a testament-dative, 680. *See* "Administrator."

——— CONFORM (S) *i. e.*, writ authorizing execution against the person on decrees of a court, where such execution could not be granted (abolished) = (E) removal of judgment by certiorari from inferior court, for purpose of having execution against the person.

——— OF EXCULPATION (S) = (E) subpœnas obtained by a prisoner to summon witnesses on his own behalf.

——— MISSIVE (S) = (E) memorandum or minute of agreement.

——— SIGNET (S) *i. e.*, writs for enforcing decrees = (E) final process.

——— OF SLAINS (S) old writ from Justiciary Court, issued by relatives of a murdered person discharging the murderer from civil damages = (E) not known.

LEVANT AND COUCHANT (E) *i. e.*, cattle that have slept a night on another person's lands may be distrained for the damage done = (S) no term; stray cattle, 411.

LEVARI FACIAS, WRIT OF (E) *i. e.*, writ of execution, by which the sheriff draws rents, and takes all the goods of a debtor to pay the judgment debt (now superseded by writ of elegit and fi. fa.) = (S) warrant to poind the goods, and decree of adjudication.

LEX FORI, *i. e.*, the law of the country where the action is brought or remedy sought, 1252, 1257, *et seq.*

—— LOCI CONTRACTUS, *i. e.*, the law of the country where the contract was made, 1240, 1316.

LIBEL (S) a criminal indictment = (E) indictment.

——— OR SUMMONS (S) in civil causes = (E) in Ecclesiastical Court the same; writ of summons and declaration at C. L.; the bill or claim in Ch.

LIBERATION, BILL OF SUSPENSION AND (S) = (E) application or motion to discharge

——— *i. e.*, from prison (S) = (E) discharge.

LIBERTY OR FRANCHISE (E) = (S) privilege.

LICENSE (E) a leave given to do something, as a landlord giving a license to the tenant to do what otherwise he has no power to do = (S) not used technically.

——— OF MARRIAGE (E) = (S) not known and not needed, 858, 862; special license, 863.

——— TO ALIEN (E) leave granted to a corporation to alien or hold lands = (S) not used, and not necessary, 27, 651.

——— TO PREACH (S) = (E) holy orders, 993.

——— TO PURSUE (S) *i. e.*, an authority given by the commissaries to an executor to sue debtors, but not to take decree = (E) probate or letters of administration, which, however, do not restrict the executor or administrator from obtaining judgment.

LICENTIATE OF THE CHURCH (S) = (E) a person in holy orders, 993.

LICKING OF THUMBS (S) = (E) same, as a symbol of a completed agreement.

LIEGE POUSTIE (S) (legitima potestate); *i. e.*, any time during life other than sixty days before death, or its equivalent, when a party may validly dispone to strangers his heritage = (E) not known, for there is no law of deathbed, 675.

LIEN (E) = (S) seldom used; retention; also hypothec, which is a lien with or without possession; generally, 594; general and particular liens, 595; pledgee has no general lien, 598; livery-stabler, 599; future advances, 600; of seller of goods, 530; of attorney, 1223.

LIFE ESTATE (E) = (S) liferent, 55. *See* "Estate for Life."

LIFERENT (S) = (E) estate for life.

——— by constitution and reservation, 60, 140; requires sasine, 55; is heritable, 56; court cannot order the life to be produced, 58; destination in liferent, 59; powers of liferenter, 64; right to crop, 68; apportionment of rent due at liferenter's death, 69; alienation of, 71; aliment of fiar, 72.

LIFERENTER (S) = (E) tenant for life.

LIGHT AND PROSPECT (S) *i. e.*, servitude of = (E) easement of light.

LIMITATION (E) = (S) destination in investiture; of estates in fee-simple, 23; of estate tail, 30, 31; of estate for life, 59; of remainders, 144; of joint estates for life, 170; of joint estate tail, 171; of joint tenancy in fee, 172; of fee by will, 721; in marriage, 929.

LIMITATIONS, STATUTES OF (E) *i. e.*, certain statutes limiting the right of suing for debts, trespasses, and generally for anything = (S) same, as to some moveable rights; prescription as to heritable property and rights; actions generally, 486; as to recovery of land, 296; actions against Crown, 297; from what time twenty years counted, 298; tenants being in possession, 299; acknowledgment of title, 300; savings in case of disabilities, 301; fraud, 305; charges and legacies, 306; suits in equity, 307; bringing action to save statute, 308; on foreign contracts, 1253.

LINCOLN'S INN (E) *i. e.*, one of the four Inns of Court, having exclusive right to call persons to the bar = (S) Faculty of Advocates.

LIQUID DEBT (S) = (E) liquidated debt or sum.

LIS PENDENS (S) = (E) the same, 1137.

LIST OF CAUSES (E) = (S) roll, 1056.

LITIGIOSITY (S) *i. e.*, an implied prohibition of alienation of property, so as to disappoint a begun or inchoate action or diligence = (E) not known; except where a judgment has been registered in the Common Pleas, or a suit has been registered as *lis pendens*, to affect lands, 1137.

LITISCONTESTATION (S) = (E) attorning to the jurisdiction.

LIVERY IN DEED (E) = (S) infeftment, 357.

——— OF SEISIN (E) which precedes the written deed of feoffment = (S) sasine or infeftment, which follows the deed or disposition, 357.

LOAN OF MONEY may be proved in (E) by parol evidence, 449; *contra* in (S). *ib.*

LOCALITY OF A WIDOW (S) *i. e.*, locality lands = (E) jointure lands.

LOCATION (S) = (E) hiring of goods; a bailment. The locator or lessor (S) is in (E) called the bailor. The conductor or lessee (S) is in (E) called the bailee, 602, 606.

LOCATOR (S) *i. e.*, the hirer in a contract of location = (E) bailor.

LOCKFAST PLACES (S) *i. e.*, places kept under lock and key = (E) not used; power to open, 1127.

LOCK OR GOWPEN (S) *i. e.*, a small quantity of meal paid to a servant of a mill, from persons within the thirl = (E) not known.

LOCK-UP HOUSES (E) strong rooms or cages for the temporary confinement of persons taken into custody = (S) also used.

LOCUS DELICTI (S) *i. e.*, the place where a crime was committed = (E) seldom used.

——— PŒNITENTIÆ (S) = (E) seldom used; time to revoke consent to an agreement.

LODGING OF PAPERS (S) = (E) generally called filing of declarations, pleas, etc., as the case may be, or entering appeals; in Ch., filing with the clerk of court, 1084, 1156.

LONDON, CUSTOM OF (E) *i. e.*, peculiar customs prevailing in the city of London strictly so called (but not in the parts, such as Westminster, Marylebone, etc., outside the city) which qualify the common law. The chief is the custom of foreign attachment, by which debts due to a person sued can be attached by the plaintiff before judgment, 480, 1060, 1120, 1247. There was formerly also a custom, whereby on the death of a person, his personal estate was divided into three parts, one of which went to the widow, if any, as a portion; another to the children as orphanage; and the third, called the deadman's part, according to the will, if any. This custom is now abolished, 674, 748, 848 = (S) these customs are still the common law of Scotland under the name of arrestment (foreign attachment E) and the division of the moveables of a dead man into the jus relictæ, the legitim, and the dead's part.

LOOSING OF ARRESTMENT (S) = (E) dissolving the attachment. *See* "Arrestment."

LORD (E) of a freehold and lord of manor = (S) superior. A lord of freehold estate exists in few cases, 18; his right in escheat, 3.

LORD ADVOCATE (S) = (E) Attorney-General, 1045; is public prosecutor in (S), 1045.

——— CHIEF BARON (E) *i. e.*, of the Court of Exch. = (S) Lord President or Lord Justice Clerk.

——— CHIEF JUSTICE (E) of the Common Pleas or Queen's Bench = (S) Lord President in the First Division; Lord Justice Clerk in the Second Division of the Inner House.

——— CLERK REGISTER (S) an officer connected with the Register House.

——— JUSTICE CLERK (S) 1055. *See* "Justice."

——— JUSTICE GENERAL (S) 1055. *See* "Justice."

——— OF MANOR'S right to wreck, 4; to estrays, 11; in copyhold estates generally, 173, *et seq.*; and *see* "Copyhold."

——— ORDINARY (S) *i. e.*, judge in the first instance = (E) Court of Common Law, 1055; or Vice-Chancellor in equity.

——— PRESIDENT OF COURT OF SESSION (S) 1055. *See* "Justice."

LORD'S DAY (S) = (E) Sunday; contracts on, 460; arresting on *mesne* process, 1142.

LORDS JUSTICES IN CHANCERY (E) an Appellate Court recently created for hearing, either with or apart from the Lord Chancellor, appeals from the Master of the Rolls, or Vice Chancellors = (S) Inner House.

——— OF JUSTICIARY (S) *i. e.*, judges of the High Court of = (E) judges of assize, and judges at Central Criminal Court, 940.

——— OF SESSION (S) all the judges of the Court of Session, or senators of the College of Justice, are called Lords of Session, by courtesy = (E) Mr. Justice, or Mr. Baron, respectively, at C. L.; in Ch. his Honour the V. C., or M. R.

LOST goods, right of finder to, in (E) 10; *contra* in (S) *ib.*

——— bill of exchange, 566; documents, 1101.

LUCRATIVE SUCCESSION (S) = (E) beneficial inheritance.

LUNATIC (E) = (S) same, also a furious person; how declared, 800; defence of lunacy, 801; weak-minded persons, 802.

LYON KING-AT-ARMS (S) an officer who appoints and deprives the messengers-at-arms who execute process, 1124; also has power to inspect and assign armorial bearings = (E) the sheriff who appoints bailiffs, and is responsible for their acts; Herald's College, as regards armorial bearings.

MACERS (S) *i. e.*, officers attending the supreme courts, who formerly held inquisitions for serving heirs = (E) ushers and officers of the court.

MADHOUSES (S) = (E) lunatic asylum.

MAGISTRATE, or Justice of Peace; proceedings before, as to crime, 953.

MAIDEN ASSIZES (E) *i. e.*, where no person is tried and condemned to die = (S) not used.

MAIL (S) old term = (E) rent.

——— GRASS (S) = (E) agistment, 411, 599.

MAILS AND DUTIES (S) = (E) rents.

——— ACTION OF (S) 113 = (E) action to recover rent; action of, by real creditor, 108, 109.

MAINPRIZE, and writ of mainprize (E) superseded by bail and writ of *habeas corpus.*

MAINTENANCE (E) = (S) aliment of parent and child, 808, 845; of husband and wife, 912, 916, 920.

MAINTENANCE (E) *i. e.*, giving money to a litigant to carry on litigation = (S) no term; *pactum illicitum*, 458.

MAJOR AND MINOR IN A LIBEL (S) certain parts of an indictment, of which the major proposition names or defines the crime, and the minor avers the pannel's guilt and the evidence thereof = (E) not used.

MALA FIDES (S) used in opposition to *bona fides*, which is a doctrine on which rights of possession and otherwise often turn = (E) seldom used, except popularly, 296, 386, 394.

MALICIOUS MISCHIEF (S) = (E) malicious injuries.

MANDAMUS, WRIT OF (E) *i. e.*, writ issued, or rule made, by the Court of C. L., and in some cases by the Court of Queen's Bench exclusively, to some inferior judge or body commanding them to do some public duty = (S) not known; action of declarator, or action of suspension and interdict, is the like remedy, 1055.

MANDANT (S) *i. e.*, person giving a mandate = (E) not used; principal, bailor.

MANDATE (S) = (E) seldom used; as to law agent or counsel, a retainer, 1222; in general matters, letter of attorney; or agreement by way of bailment.

MANDATORY (S) *i. e.*, a person acting under a mandate from some principal to sue in his name; he requires to be joined with the pursuer, in whose joint names the action proceeds = (E) not used. A person who acts as surety for costs of an action or suit brought by a plaintiff residing out of the jurisdiction; no name is given to him except surety for costs, 1114.

MANOR (E) *i. e.*, a freehold estate, which may be parcelled out in copyholds, 173, 176.

——— LORD OF THE (E) = (S) superior, all lands in (S) being held under some superior, 16, 18, 90, 173, 176.

MANSE (S) *i. e.*, house of incumbent of a benefice of Established Church, and nearly every incumbent is entitled to one = (E) rectory, or vicarage house, or parsonage house, or house of residence, as the case may be, but they are not provided by a general statute, 1013.

MANSLAUGHTER (E) = (S) culpable homicide.

MARCHES (S) *i. e.*, boundaries of property. By stats. 1661, c. 41, and 1685, c. 39, a proprietor of land may compel the conterminous proprietor to bear half the expense of a mutual fence or enclosure. Ersk. 2, 6, 4; Bell's Pr. § 958 = (E) fences; also abuttals, when used in describing lands or premises in a conveyance. One owner cannot compel the adjoining owner to bear half the expense of a fence, and there is no general statute compelling either party to fence.

MARGINAL NOTE (S) or addition on the side of the page in a deed = (E) the same, but seldom used in this sense; it is usually called an addition; in a deed, 348; in a will, 666.

——— OF A LAW REPORT (E) = (S) rubric.

MARKET, OPEN (S) = (E) market overt; as to sale of stolen goods in, 539, 941; sale of crop in, 406.

——— OVERT (E) *i. e.*, an open market in which, if stolen goods are sold, the innocent purchaser is in general entitled to keep them, at least for a time, against all but the real owner, 941 = (S) open market; and the innocent purchaser is not entitled to keep them from the real owner. If a tenant sell grain in open market in bulk, the landlord's hypothec for rent does not attach, 406.

MARKSMAN (E) *i. e.*, a person who can only sign a will or writing by a mark instead of a signature = (S) the same, but seldom used.

MARRIAGE (E) requires more than mere consent, 858; not constituted by mere acknowledgment or promise, *cum copula*, or cohabitation, 859, 860, 861; banns, license, etc., 862; marriage must be in church, etc., 863; at certain hours, 864; residence of parties, 865; wife's name after marriage, *ib.*; infant marrying, 866; divorced party marrying adulterer, 867; deceased wife's sister, 868; breach of promise, 869; criminal conversation, 870; divorce, 872; wife's right to, 872; desertion, 875; husband's right to divorce, 876; judicial separation, 878; wife's earnings, 879; wife when judicially separated, 880; voluntary separation, 881.

——— agreements in consideration of marriage, 922; barring legal rights by marriage settlement, 923; dealing with dower, 924; jointure barring dower, 924; provision to widow, 925; advancement of child, 926; usual strict settlement, 927; construction of marriage settlements, 928; wife's trustees, 929; covenant to settle after acquired property, 930; restriction on husband's alienation, 931; legacy to feme covert, 708.

——— CONTRACT (S) = (E) marriage settlement, 922, *et seq.*

——— Effect of marriage on property, 883; wife's chattels, etc., 884, 885; wife's real estate, 886; acknowledgment of deeds by married women, 887; wife's powers before marriage, 888; husband's liability for wife's debts, 889; wife's earnings, 890; husband's liability to maintain wife, 891; wife's equity to settlement out of legacy, 892; wife's will, 894; wife's power to bind husband for necessaries, 898; process against wife, 899; curtesy of husband, 901; rights of wife on death of husband, 902; paraphernalia, 904; dower of wife, 907; how barred, 908; assigning of dower, 911; widow's claim for maintenance from executors, 912; widow's mournings, 913; curtesy of husband, 914; husband's rights after wife's death, 915; his right to maintenance from her executors, 916; his liability after wife's death, 917; wife's separate estate, 920; alienation of separate estate, 921.

MARSHAL of the Queen's Bench Prison (E) *i. e.*, the officer having the custody of the prisoners therein.

MARSHALLING OF ASSETS (E) *i. e.*, where there are legal and equitable assets of a person deceased, and a creditor has obtained part payment out of the former by way of preference, the Court of Chancery will postpone him, till other creditors obtain an equal payment out of the former = (S) ranking of catholic and secondary creditors, 693.

MARTINMAS (S) *i. e.*, one of the four quarter days for paying rent, viz., 11th November = (E) not used; the nearest is Michaelmas day, 25th September.

MASTER AND SERVANT; contract in writing if beyond one year, 821; general hiring, 825; one servant injuring another, 826; specific performance of contract, 827; notice to leave, 828; death of master, 831; bankruptcy of master, 833; servant's death, 834; wages in case of a distress in master's house, 835; limitation of actions, 836; attachment of wages, 837; seduction of servant, 838; service with relations, 839; workmen, artificers, etc., 840.

——— IN CHANCERY (E) an officer of the Court of Chancery, who is now

superseded by the Chief Clerk, and by the Vice-Chancellor, or Master of the Rolls, together sitting in chambers = (S) Clerk of Session as to part of duties; as to other duties, a commissioner, to whom a remit is made.

MASTER OF THE COURT (E) *i. e.*, an officer in the courts of C. L., who taxes the costs and makes minutes of the business done in court = (S) as to business in court, the clerk of session; as to taxing costs, the auditor of the Court of Session.

——— OF THE ROLLS (E) one of the judges of the Court of Chancery, and assistant to the Lord Chancellor; he has precedence of the Lords Justices, though his decrees may, like those of the Vice-Chancellor's, be reviewed on appeal by them.

——— OF THE TEMPLE (E) *i. e.*, the chief minister of the Temple Church is now so called.

MAYOR (E) *i. e.*, the chief magistrate of a city or town corporate = (S) provost.

MEDICAL EXPENSES not a privilged debt in (E), 685.

MEDIETATE LINGUÆ, JURY DE (E) *i. e.*, where an alien is indicted, he can at his trial demand that half of the jury be foreigners = (S) not known and not competent, 969.

MEDITATIONE FUGÆ WARRANT (S) *i. e.*, warrant to apprehend a debtor leaving the country if debt above £8 : 6 : 8, which may be obtained from a justice of the peace = (E) at C. L. capias under judge's order to hold to bail; in country districts a warrant of county court judge, or commissioner in bankruptcy, may also be had to arrest an absconding debtor, 1146; in Ch. an escape warrant, also a writ of *ne exeat regno*.

MELIORATIONS (S) by a tenant, which he can claim if *bona fide*, and if landlord is benefited, and the lease is suddenly terminated = (E) improvements, which in general a tenant cannot claim; by tenant, 394.

MEMORIAL FOR COUNSEL (S) = (E) brief.

——— FOR OPINION OF COUNSEL (S) = (E) case for opinion of counsel.

MERCANTILE WRITS (S) privileged as regards proof = (E) no term, there being no distinction between these and any other writs, 447.

MERGER (E) doctrine of, whereby a simple contract is drowned in a contract by specialty or of higher degree, and also a smaller estate is drowned in a larger = (S) not used; consolidation as to estates; and as to contracts, not known; of simple contract, 437; of terms in freehold estate, 75, 142.

MESNE LORD (E) = (S) mid-superior.

——— LANDLORD (E) = (S) intermediate landlord.

——— PROCESS (E) *i. e.*, process in an action or suit previous to final judgment or decree = (S) not used; incident diligence.

MESSENGER-AT-ARMS (S) *i. e.*, an officer who executes summonses, citations, etc., and also diligence on final decree; messengers are under the direct control, not only of the Court, but of the Lord Lyon-at-Arms, who appoints them, and they give caution to him = (E) bailiff or sheriff. The parties in the cause serve all writs themselves, and notices up to the signing of judgment; but the sheriff executes the writs afterwards. The sheriff of each county or city levies execution through his bailiffs; the bailiff is bound to the sheriff, and the sheriff is responsible to the parties, 1069, 1124.

MESSUAGE (E) = (S) dwelling-house.

MICHAELMAS DAY (E) *i. e.*, one of the four usual quarter days for payment of rent by tenants, viz., 25th September = (S) not used; the nearest is Martinmas, 11th November.

——— TERM (E) *i. e.*, one of the four terms during which the courts of law sit in banc; commences 2d and ends 25th November = (S) not used; winter session, 1056.

MIDDLE TEMPLE (E) *i. e.*, one of the four inns of court having power to call persons to the bar = (S) Faculty of Advocates, 1209.

MID-IMPEDIMENT (S) *i. e.*, act or event preventing the retrospective effect of a later act or event.

MID-SUPERIOR (S) *i. e.*, one who is superior to those below him, and vassal to those above him = (E) in freeholds not known, for subinfeudation is prohibited; in copyholds, also unknown, 198.

MILL, custom or covenant to do suit to, or grind corn at the landlord's mill (E) = (S) thirlage, 290; multures are payments in grain to the proprietor of the mill, and may be commuted by 39 Geo. III., c. 55.

MINES OF GOLD, etc., 9; right to mines in freeholds, 20; in copyholds, 176; under highway, 12; right of tenant in tail to dig, 49; of tenant for life, 64, 65, 66.

MINOR (S) *i. e.*, a male from 12, or a female from 14 to 21 = (E) not used; except popularly; infant, *i. e.*, a person from birth to 21.

MINORITY (S) *i. e.*, the age during which a person is a minor = (E) infancy.

MINUTE (S) = (E) same as memorandum.

——— BOOK OF RECORDS (S) *i. e.*, a book in which the keeper of the register enters the day and hour at which a deed or writing was presented for registration, so as to regulate priority = (E) not used.

——— OF COURT OF SESSION *i. e.*, short abstract of the decrees and proceedings printed for the profession = (E) not known.

——— OF COURT (S) *i. e.*, a record of some judicial act or statement, done or made by the court = (E) an order of court or of a judge.

——— OR MISSIVE OF SALE (S) = (E) memorandum of agreement for a sale.

MINUTES OF DEBATE (S) *i. e.*, a written argument of counsel printed by order of the court = (E) not known, except in the House of Lords, 1074.

MISADVENTURE, HOMICIDE BY (E) *i. e.*, the killing of a person, partly by negligence, and partly by accident = (S) included in excusable homicide.

MISDEMEANOUR (E) all the minor crimes lower than felony = (S) no term; crime, 950.

MISFEASANCE (E) *i. e.*, doing a thing wrongly, as opposed to nonfeasance, which is not doing the thing at all = (S) not used.

MISNOMER, PLEA OF (E) *i. e.*, one of the pleas in abatement, setting out that the defendant is sued in a wrong name = (S) not used; preliminary or dilatory plea, 1073.

MISPRISION OF A CLERK (E) or officer of court in entering proceedings on the record = (S) clerical error.

MISSIVE OR MINUTE OF LEASE (S) = (E) agreement for a lease, or memorandum of ditto.

MISSIVES IN RE MERCATORIA (S) = (E) memorandum of agreement.

MISTAKE IN CONTRACTS (E) = (S) error, 453; money paid by, 454.

MITTIMUS (E) *i. e.*, a writ for transferring a record out of one court into another = (S) not used.

MIXED ACTIONS (E) *i. e.*, those which are partly personal and partly real, now abolished, except ejectment = (S) not used.

MOBBING (S) = (E) unlawful assembly.

MODERATING A CALL (S) *i. e.*, where the presbytery, after a presentee has received a presentation, appoint a day for the parishioners to meet, and give him a call or invitation = (E) not known, 993.

MODERATOR (S) OF THE GENERAL ASSEMBLY, *i. e.*, the chairman, speaker, or president = (E) not used; in the convocation, he is called *prolocutor*, 991.

MODIFICATION (S) *i. e.*, a decree of the Teind Court fixing new stipend for a minister = (E) not known.

MODIFY EXPENSES (S) = (E) abate costs.

MODO ET FORMA (E) words formerly used in pleading, implying that the trespass or other thing was not done in the way set forth by the plaintiff = (S) not used.

MODUS (E) *i. e.*, a custom of paying some compensation or composition in lieu of titles = (S) not used in the same sense; modus is a valuation put on the teinds, 1019.

MOLESTATION, ACTION OF (S) *i. e.*, an action against parties intruding into, or disturbing the possession of heritage; now mostly superseded by interdict = (E) an action of trespass *quare clausum fregit* at C. L.; in Ch. injunction may often be issued.

MOLLITER MANUS IMPOSUIT (E) terms formerly much used in pleading a justification of a trespass or assault, viz., that the defendant only gently laid his hand on the plaintiff, and used only necessary force = (S) not used.

MONEY HAD AND RECEIVED, ACTION FOR (E) = (S) action of repetition, or *condictio indebiti*, 453.

——— PAID, ACTION FOR (E) *i. e.*, for money paid by plaintiff at the request, express or implied, of the defendant = (S) no term, 464.

MORA (S) or delay = (E) laches.

MORTGAGE OF REAL ESTATE (E) = (S) bond and disposition in security; generally, 89; ordinary form of, 90; old forms, 91; as to the fee, 92; completion of mortgagee's title, 93; assignment of mortgage, 95; future advances, 97; arrears of interest, 98; custody of title deeds, 99; twice mortgaging, 100; nature of mortgagee's estate, 101; notice on paying off debt, 104; defective mortgage deed, 105; power of sale in deed, 106; mortgagee's power of distress, 107; right to enter into possession, 108; remedies of mortgagee, 111; tacking of mortgages, 114; extinguishment of debt, 115; costs on mortgage, 116; mortgagor's estate and rights, 117; vote at elections, 122; equitable mortgages, 123; statutory mortgages, 130; lease granted by way of, 381.

MORTGAGEE (E) = (S) heritable creditor, or creditor in bond and disposition in security, or bondholder, 101. *See* "Mortgage."

MORTGAGOR (E) = (S) no term; debtor, 117. *See* "Mortgage."

MORTIFICATION (S) as a tenure = (E) tenure in frankalmoign, or mortmain, 16.

——— (S) as a fund set apart to charity or an hospital = (E) charity or charitable trust.

MORTIS CAUSA DEED (S) *i. e.*, a deed which is not to operate till the death of the maker, which is generally done by his keeping it in his own

possession till his death = (E) a will; also a deed may be constructed, 662, 718, 1268.

MORTMAIN (E) = (S) mortification; Mortmain Act, 26; does not extend to (S), *ib.*, 1278.

MORTUARY (E) a kind of ecclesiastical heriot due in some parishes, on a death, to the parson = (S) not known.

MORTUUS SASIT VIVUM (E) *i. e.*, the moment a man is dead, his real estate vests in the heir-at-law, whoever that may be = (S) not known, the maxim being *nulla sasina nulla terra*, the land is *hæreditas jacens*, until the heir-at-law elects to accept the liabilities implied by that title, 779.

MOTHER, her right to custody of children, 844.

MOTION (E) *i. e.*, a short and summary mode of taking a step in a suit or action at C. L., or in incidental matters; the motion is generally for a rule nisi, or for a rule absolute in the first instance, after which the opponent is served with the rule nisi, and afterwards shows cause against it = (S) the same, but generally the opponent appears at the time when the motion is made, to oppose it (*i. e.*, he shows cause in the first instance).

MOURNINGS OF WIDOW; not a privileged debt in (E), 913.

MOVEABLES (S) *i. e.*, all kinds of property which form executry, and go not to the heir but the executor = (E) personalty; goods and chattels; choses in action; personal estate.

MUIRBURN (S) = (E) maliciously setting fire to a heath.

MULTIPLEPOINDING, ACTION OF (S) *i. e.*, an action raised by a person in possession of a fund, as to which he is threatened with double poinding or distress. An arrestee (garnishee) generally raises such action. The fund is called the fund *in medio*. The raiser of the action then consigns the fund (pays into court). Sometimes a common agent is appointed to attend to the interests of all the parties. The final interlocutor is an interlocutor "preferring" one of the competitors = (E) in Ch. a bill of interpleader; at C. L. a rule of interpleader may be had in a few cases.

MULTURES (S) *i. e.*, grain payable to owner of a mill by proprietors, etc., of thirled lands, 290 = (E) tenants are sometimes bound by custom to grind corn at the manor mill, or bound by covenant to do suit to a particular mill, otherwise this right as to lands is unknown.

MUTE (E) where a prisoner on being arraigned makes no answer to the question Are you guilty or Not guilty, in that case a jury is empannelled to try if he is mute by visitation of God or only feigning = (S) not used; if no answer, "not guilty" is presumed.

MUTILATION (S) = (E) mayhem.

MUTUUM (S) = (E) exchange, treated as a sale, the difference being that in the former the contract is to deliver goods, in the latter money.

NARRATIVE (S) *i. e.*, of a deed, etc., or Act of Parliament = (E) recital of a deed, etc.

NATURAL OBLIGATIONS (S) = (E) moral duty.

NAUTÆ, CAUPONES, STABULARII (S) edict of, borrowed from the Civil law, *i. e.*, carriers, innkeepers, etc., are liable for safe keeping of their guest's goods = (E) not used; but at C. L. a similar liability is incurred by bailees, 603.

NE EXEAT REGNO (E) *i. e.*, a writ issuing from the Court of Chancery to restrain a person from going out of the kingdom = (S) A *meditatio fugæ* warrant, 1140, 1245.

NEGATIVE PREGNANT (E) *i. e.*, a term formerly used in pleading to denote such a denial of a fact as also implies or carries with it an affirmative = (S) not used.

——— PRESCRIPTION (S) = (E) prescription by non user or neglect, as regards incorporeal hereditaments; Statute of Limitations, as regards land, 295.

NEGLIGENCE (E) often called laches and acquiescence = (S) generally called *culpa*; also *mora*, or delay.

NEGOTIORUM GESTOR (S) = (E) a gratuitous bailee.

NE RECIPIATUR (E) a notice given to the clerk of assize, or associate at *nisi prius*, not to receive a record which has not been entered for trial in time = (S) not used.

NE UNQUES EXECUTOR OR ADMINISTRATOR (E) *i. e.*, a plea by an executor or administrator, that he never was executor or administrator of the person deceased = (S) not used.

NEVER INDEBTED (E) plea of, *i. e.*, the plea of the general issue in actions on contracts for debt, implying that there is no debt; often called *nunquam indebitatus* = (S) not used, 1073.

NEW ASSIGNMENT (E) in pleading to an action of trespass, etc., if the defendant plead evasively, the plaintiff may, by a new assignment, state the wrong with greater certainty and detail = (S) not used.

——— TRIAL; in criminal cases, 943.

NEXT FRIEND (E) OR PROCHEIN AMI, *i. e.*, a person by whom an infant sues in courts of law and equity, and by whom a married woman also often sues in courts of equity, and who is responsible for costs = (S) tutor or curator *ad litem*, 818, 885.

——— OF KIN, 732, *et seq.* *See* "Intestate Succession."

NIL CAPIAT PER BREVE (E) *i. e.*, the judgment given for the defendant on a demurrer signifying that the plaintiff shall take nothing by his writ = (S) interlocutor sustaining a plea to the relevancy.

——— DEBET (E) *i. e.*, the plea of the general issue in actions for debt, not founded on a deed or specialty = (S) not used.

——— DICIT (E) a judgment against a defendant for not pleading or answering = (S) not used.

NIMIOUS (S) = (E) not used; hard, oppressive, excessive, litigious, sharp in practice.

NISI PRIUS, TRIAL, OR SITTINGS AT (E) *i. e.*, a trial by jury, so named from the first words of an ancient writ to summon the jury = (S) sittings of the jury court.

——— RECORD (E) *i. e.*, the copy of the pleadings transcribed on parchment up to the point at which issue was joined, and which is given to the clerk of assize or associate = (S) the record.

NOBILE OFFICIUM OF COURT OF SESSION (S) *i. e.*, its equitable jurisdiction = (E) equitable jurisdiction, and which is almost exclusively vested in the Court of Chancery.

NOLLE PROSEQUI (E) *i. e.*, entry of memorandum by plaintiff or prosecutor abandoning one or more courts in a declaration or indictment = (S) abandonment of action, 1113.

NOMINATE AND INNOMINATE (S) *i. e.*, certain contracts and crimes have definite names, and are called nominate, while others are innominate, and do not fall under any of the former = (E) not used; an innominate contract would be called a special contract; an innominate crime would generally be no crime at all, 452, 989.

NON-APPEARANCE (E) *i. e.*, failure of the defendant to appear in the action = (S) also used; absence, 1071, 1155.

NON ASSUMPSIT (E) *i. e.*, the plea of the general issue to an action of assumpsit, denying that the promise was ever made = (S) not used, 1073.

—— DAMNIFICATUS (E) a plea so called in answer to an action of debt on an indemnity bond, importing that the plaintiff had been kept harmless according to the bond = (S) not used.

—— DETINET (E) *i. e.*, the plea of the general issue in the action of detinue, denying that the defendant detains the goods = (S) not used, 1073.

—— EST FACTUM (E) *i. e.*, the plea of the general issue to an action on a bond or deed, denying that the deed was made by the defendant = (S) not used, 1073.

—— EST INVENTUS (E) *i. e.*, the return made by a sheriff who has been directed by a writ of *ca. sa.* to arrest the debtor or defendant, importing that the person cannot be found = (S) not used.

NON-ENTRY OF HEIR (S) *i. e.*, when the heir-at-law of a deceased person who was infeft in heritable property has not made up his title, and entered with the superior = (E) not known; because not needed in freeholds; in copyholds where heir has not yet been admitted by the lord of the manor, and if the heir refuse to be admitted, the lord can seize the land *quousque*, 20, 189.

NONFEASANCE (E) *i. e.*, omitting to do a thing. *See* "Misfeasance."

NONJOINDER, PLEA OF (E) *i. e.*, a plea by the defendant that other parties have not been joined either as co-plaintiffs or co-defendants = (S) plea that parties have not been called, 1073.

NONOBSTANTE VERDICTO (E) *i. e.*, a motion to enter up judgment for a party, notwithstanding the verdict, on the ground that the issue was immaterial = (S) motion to apply the verdict and for a new trial.

NON OMITTAS (E) a clause in a writ addressed to the sheriff importing that he is to enter any liberty within his bailiwick in order to execute the writ = (S) not known.

—— PROSEQUITUR (E) *i. e.*, a judgment obtained by the defendant for costs against a plaintiff, who neglects to prosecute the action after due notice, and according to the rules of the court = (S) interim decree for expenses; extract protestation, 1113, 1115.

NONSUIT (E) at C. L., which generally, but not necessarily, occurs at the trial of an action when the plaintiff, finding the verdict will be against him, consents to be nonsuited, in which case he can bring a fresh action = (S) not used as regards jury trials; decree or judgment dismissing summons, without prejudice to new action.

NON VALENS AGERE (S) or *non valentia*, *i. e.*, the circumstance of the pursuer being unable to sue, as interrupting prescription = (E) disabilities of infants and others, under Statutes of Limitation, 301, 494.

NOTARY-PUBLIC (S) who was, and still is to a less extent, a practitioner whose services are often required, in reference to the conveyance of land, and protesting bills, and performing acts of which evidence is

required to be preserved = (E) the same, but he is never required in conveyance of real estate, and seldom in protesting bills, 354, 1233.

NOTE OF ADVOCATION (S) = (E) certiorari.

—— OF SUSPENSION AND INTERDICT (S) = (E) as regards county courts, prohibition; as regards magistrates' courts, certiorari; in ordinary matters, bill or motion for an injunction.

NOTES, BANK (S), 469.

—— RECLAIMING (S) petitions of appeal from a Lord Ordinary to the Inner House = (E) suggestion of error at C. L.; appeal in Ch., 1055.

NOT GUILTY, plea of (S) = (E) same in criminal cases.

———— plea of (E) *i. e.*, the plea of the general issue in actions of trespass, trover, case, etc. = (S) not used, 1073.

—— PROVEN (S) *i. e.*, a verdict of a jury in a criminal trial (and also in a civil trial), which means that the evidence has not been satisfactory and sufficient = (E) not known; such verdict is entered "not guilty," 984.

NOTICE (E) = (S) intimation; in assigning debts, 476.

——— OF INQUIRY (E) *i. e.*, a notice given by the plaintiff to the defendant in an action, when judgment has passed for an unliquidated sum, that the sheriff will assess the damages = (S) not known.

——— TO ADMIT (E) *i. e.*, a notice given by one party to another, previous to trial, to admit the authenticity of certain documents, and offering inspection, failing which, the party refusing to admit must in general pay the costs of proving the documents = (S) not used, but the parties often agree to admit documents in like manner; and, moreover, the parties must lodge all papers, not already in process, with the clerk of court, 1084.

——— TO LEAVE (E) given to servants = (S) warning, 828.

——— TO PLEAD (E) *i. e.*, a notice given by the plaintiff to defendant to plead or state his plea, failing which, judgment will be signed = (S) circumduction of time to lodge defences, 1075.

——— TO PRODUCE (E) *i. e.*, a notice to produce a document, given by one party to another before and at trial, failing which production, the former party can give secondary evidence = (S) such notice is not necessary, but secondary evidence can be given if the document is withheld, it being the duty of the party founding on documents to produce them, and lodge them with the clerk of court before the day of trial, 1084.

——— TO QUIT (E) a house or leasehold premises = (S) warning; when necessary, 420; tenant holding over, 421; double rent, 422; in yearly tenancies, 423.

NOTOUR BANKRUPTCY (S) = (E) condition of a trader who has committed acts of bankruptcy, 1178.

NOVATION. *See* "Innovation."

NOVODAMUS, CHARTER OF (S) *i. e.*, renewal of feudal grant by superior = (E) in freeholds not known; in copyholds, entry of admittance on roll, 20, 187.

NUDUM PACTUM (S) *i. e.*, an agreement without any onerous consideration, but which is valid = (E) not a ground of action in simple contracts, a consideration being essential, 441, 524.

NUISANCE; in (E) an injunction cannot be obtained to prevent a contemplated

nuisance = (S) such an interdict can be granted. *Arnot* v. *Brown*, 24 Sc. Jur. 421.

NULLA BONA (E) *i. e.*, the return or answer made by the sheriff to a writ of fi. fa. issued against the debtor, that there are no goods which can be seized to pay the debt = (S) not used.

——— SASINA NULLA TERRA (S) *i. e.*, a maxim implying that sasine or infeftment is the test of the right of property = (E) no such maxim is received; on the contrary, a person not seised has generally the same rights as if he were seised, 363.

NUL TIEL RECORD (E) *i. e.*, a replication by a plaintiff to a defendant who has pleaded judgment recovered (*res judicata* S), that there is no such record = (S) not used, 1079.

NUNCUPATIVE TESTAMENT (S) = (E) same; also verbal will, 678.

NUNQUAM INDEBITATUS (E). *See* "Never Indebted."

OATH (S) = (E) the same; also an affidavit or deposition.

——— IN LITEM (S) = (E) not known, 1103.

——— OF CREDULITY (S) = (E) at C. L. not known; but in some interlocutory applications an affidavit of *bona fide* belief must be made, as to the cause of action or defence being good. In Ch. something similar is necessary in filing certain bills.

——— OF PARTY (S) or oath of reference. *See* "Reference."

——— OF REFERENCE (S) *i. e.*, staking the truth or merits of case on opponent's oath = (E) not known, 481, 1086.

——— OF VERITY (S) in sequestrations = (E) affidavit of debt in bankruptcy.

——— IN SUPPLEMENT (S) an ancient mode of eking out imperfect evidence by one's oath = (E) no term, 1104.

OBLIGANT (S) or granter of obligation, or debtor in an obligation = (E) obligor, *i. e.*, one who makes a bond, 448; in other cases, party contracting.

OBLIGATION (E) the old name for a bond = (S) bond.

——— (S) = (E) contract; also covenant, bond, promise, express or implied, 431.

OBLIGEE (E) = (S) the creditor in the obligation, or the receiver of the bond or grantee.

OBSTRUCTION OF OFFICERS in course of their duty (E) = (S) deforcement.

OBTEMPER (S) = (E) obey, perform.

OCCULT OR DOMESTIC CRIMES (S) *i. e.*, crimes which are necessarily or usually done in secret, and of which direct evidence seldom can be given = (E) no term.

OCCUPANCY (S) = (E) possession or finding.

OCCUPANT (S) = (E) occupier.

——— GENERAL (E) = (S) no term; stranger in possession, 56.

——— SPECIAL (E) = (S) heir of provision; in certain class of cases, 56.

OFFER AND ACCEPTANCE of goods for sale, 524; party giving time to accept need not wait in (E) 524; *contra* in (S) *ib.*

OFFICE COPY (E) = (S) extract.

OFFICIAL ASSIGNEE (E) *i. e.*, the officer of court in bankruptcy and insolvency, in whom the bankrupt's estate vests at once = (S) interim factor, 1175.

OFFICIO INFORMATION, EX (E) *i. e.*, information by Attorney-General, or Master

of the Crown Office, charging a person with a misdemeanour = (S) criminal letters, 959.

Onerous Cause (S) = (E) valuable consideration.

——— Deed (S) = (E) deed for valuable consideration.

Onus Probandi (S) = (E) same, *i. e.*, the burden of proof in jury trails; this is generally spoken of as the right to begin, because the party who begins has generally a right to reply, 1088.

Open Charter (S) *i. e.*, where the precept of sasine has not been executed = (E) in freeholds not known; in copyholds, after surrender but before admittance, 186.

—— Doors (S) letters of, *i. e.*, authority to poind effects in lockfast places, now included in precept under 1 & 2 Vic., c. 114. *See* also "Doors" = (E) not known, and no court can give power in civil causes to open the outer door, 1127.

Opening the Pleadings (E) *i. e.*, when a trial begins, the junior counsel states shortly to the jury the nature of the pleadings = (S) not used, 1087.

Orator and Oratrix (E) the technical terms used in a bill in Ch. for the petitioner = (S) petitioner.

Ordinary Endurance (S) a lease is said to be of ordinary endurance which is for 19 or 21 years = (E) no term.

——— Judge (S) *i. e.*, the sheriff, who is called the judge ordinary of the county = (E) not used. The judge of the Probate and Divorce Court is called the Judge Ordinary. The Ordinary is the person having peculiar or original ecclesiastical jurisdiction, and is generally the bishop of the diocese.

——— Lord (S) *i. e.*, a judge of the Court of Session, before whom, in general, all cases are decided in the first instance = (E) at C. L., the court in banc., and not a single judge, decides the cause in the first instance, 1056; in Ch., a Vice-Chancellor or the Master of the Rolls decides causes in the first instances.

Ordination (E) *i. e.*, the conferring of holy orders = (S) licensing a person to preach, after which he is called a licentiate or probationer, 993.

——— (S) *i. e.*, settling a presentee as minister of a parish by the presbytery = (E) institution and induction, 993.

Original Writ (E) *i. e.*, the writ of summons by which an action at law is commenced = (S) summons, 1068.

Ouster (E) *i. e.*, dispossession = (S) being expelled, or put out of possession.

Outer House (S) *i. e.*, the department of the Court of Session, consisting of five Lords Ordinary, sitting each separately, who decide nearly all causes in the first instance = (E) at C. L., no single judge has primary jurisdiction; in Ch. a Vice-Chancellor or the Master of Rolls has, 1054.

Outlawry or Fugitation (S) in criminal cases = (E) outlawry, which is also used in civil courts, in respect of defendants who cannot be found, so as to be served with the process.

Out of Court (E) *i. e.*, the state of a plaintiff in an action who has not declared within a year = (S) not used, 1075.

Outside Plenishings (S) *i. e.*, horses, cows, and implements of husbandry = (E) no term.

Overseers of Poor (E) = (S) parochial board, 1026.

OVERTURE (S) a term used in ecclesiastical meetings to denote a suggestion or resolution as to dealing with a subject = (E) not used, 991.

OYER AND TERMINER, COMMISSION OF (E) *i. e*, the usual commission to judges to try criminal causes on circuit = (S) Justiciary Court, 940.

PACTION (S) = (E) agreement.

PACTUM ILLICITUM (S) = (E) an illegal agreement or contract or one against public policy, *contra bonos mores*, etc.

——— DE QUOTA LITIS (S) *i. e.*, a corrupt agreement for a share of money or property recovered in an action = (E) not used; but see "Champerty or Maintenance," 458.

——— SUPER HÆREDITATE VIVENTIS (S) = (E) sale by an heir of an expectancy or reversion, 456.

PAGINATION OR PAGING OF DEEDS (S) = (E) not necessary, 349, 350.

PALATINE COUNTIES (E) *i. e.*, two counties, Lancaster and Durham, where formerly there was a separate jurisdiction, and writs used to be sent into them by peculiar forms, which are now mostly abolished = (S) not known.

PALINODE (S) *i. e.*, a mode of compelling a party, in a Commissary Court, to recant publicly a defamatory charge under the penalty of increased damages, M. 6083. Turner, 21 June 1831 = (E) not known.

PANEL OR ROLL OF JURORS (S) = (E) same.

PANNEL (S) *i. e.*, the person accused of a criminal offence is so called from the time of his appearance = (E) he is called prisoner in treason and felony; defendant in misdemeanours.

——— PLEA OF THE (S) = (E) plea to the indictment.

PAPER BOOK (E) *i. e.*, a copy of the record in an action at law, containing the pleadings down to joinder in an issue in law = (S) not used, 1078.

——— DAYS (E) *i. e.*, certain days in the Courts of Common Law when the court takes business consisting of arguments, of demurrers, and special cases = (S) not used. But certain rolls (lists) are taken on particular days, as debate rolls, motion rolls, etc.

PAPERS IN A PROCESS OR CAUSE (S) = (E) documents or writings left in Ch. with clerks of records and writs; at C. L. each party keeps his own papers. 1084, 1156.

PARAMOUNT, LORD (E) *i. e.*, the highest lord of a fee = (S) superior.

PARAPHERNALIA (S) = (E) same, 904.

PARCELS (E) *i. e.*, clause in conveyance or lease describing the land and abuttals = (S) in lease, clause of possession, 377; in disposition, included in dispositive clause, 361.

PARCENARY (E) *i. e.*, the tenure of land by coparceners = (S) no term; common property held by heirs-portioners, 164, 777.

PARCENERS (E) = (S) heirs-portioners.

PARENT AND CHILD, legitimacy of child, 841; declaration of legitimacy, 842; right of father to custody of child, 843; mother's right, 844; obligation of parent and child to maintain each other, 845; bastardy, 849; affiliation, 854.

PARISH CLERK (E) *i. e.*, an officer chosen generally by the parson, but sometimes by the inhabitants, who leads the responses in the parish church for the congregation = (S) not known; a precentor leads the psalmody.

PARISH OFFICERS, 1005.

——— SCHOOL (S) = (E) not known, 1021.

PARK (S) = (E) forest.

PAROCHIAL RELIEF (S) = (E) relief from the parish.

PAROL AGREEMENT (E) *i. e.*, an agreement, either verbal or by writing, not under seal = (S) agreement by parole or in writing, 434.

——— PROOF OR EVIDENCE (S) *i. e.*, evidence of witnesses who saw or heard the matter = (E) parol evidence, which, however, may be not only by witnesses, but by any writing not under seal.

PARSON (E) = (S) minister.

PARSONAGE HOUSE (E) = (S) manse, 993, 1013.

PARTIBUS (S) *i. e.*, a note of the names of the parties in a cause, written on the margin of a document = (E) title of the cause, like a præcipe, 1069.

——— SCORING OF (S) = (E) something like filing a præcipe.

PARTICULAR ESTATE (E) *i. e.*, a life or other limited estate granted out of a larger estate, and leaving a reversion or remainder = (S) not used, 140.

PARTICULARS (E) or details, as for example, as to the residence of a party in an action, the items of account sued for, etc. There are particulars of demand, being the account stating the nature of the debt. There are particulars of residence, *i. e.*, the residence of the plaintiff in the action, etc. = (S) not used, such details being generally included in the summons and condescendence.

PARTITION (E) of joint estates and estates in common = (S) division among joint tenants, 160; among tenants in common, 163; coparceners, 165-6.

——— BILL FOR A (E) = (S) action of division.

——— DEED OF (E) = (S) deed of division.

PARTNERSHIP, firm, if a distinct person, 639; remedy of partners *inter se*, 640; set-off of partnership debt, 642; partner binding firm by deed, 643; bankruptcy of firm, 644; notice of retirement of partner, 645.

PARTS AND PERTINENTS (S) = (E) appurtenances.

PARTY-WALL (E) = (S) mutual gable.

PASSIVE TITLE (S) *i. e.*, a title incurred by an heir in heritage who does not enter as heir in the regular way, and therefore incurs liability for the whole debts of deceased, irrespective of the assets, 781. As to moveables a similar title is that of vitious intromission = (E) in real estate, not known; nor in personalty, but such a person is called *executor de son tort*, 695, 781.

PASTURAGE (S) servitude of = (E) common of pasture, 279.

PATRIMONIAL INTEREST (S) = (E) legal estate as distinguished from the equitable estate, as the estate of the *cestui que* trust (beneficiary S); also right of property generally.

PATRONAGE (S) = (E) advowson, 997.

PAUPER (E) = (S) person on the poors-roll; right of poor prisoner to counsel, 966, 1212.

PAYMENT INTO COURT (E) = (S) consignment of the fund in court. It is also often paid into a bank.

——— OF LEGACIES, 706; of debts of deceased debtor, 684, *et seq.*

——— OF MONEY, how proved, 461; stamped receipt, 462; presumption of, 463; stranger paying debt, 464; in bank notes, 469; into court, 471.

PEACE, ARTICLES OF THE (E) = (S) lawburrows. See those titles.

——— BILL OF (E) *i. e.*, a bill in Chancery brought to establish and perpetuate a right = (S) action of declarator; a declarator and interdict.

PECULIARS, COURT OF (E) a branch of the Court of Arches = (S) not known. There are no local exceptions to ecclesiastical jurisdiction, 995.

PEDIGREE (S) = (E) same.

PEERS' right to sit in Parliament, 1032.

PEJORATIONS OR DETERIORATIONS (S) = (E) dilapidations.

PENAL BOND, *i. e.*, bond with a penalty (E) = (S) bond for double amount of debt on condition, the object being to secure debt or performance of condition and expenses by a liquidated sum, 448.

——— IRRITANCIES (S) = (E) forfeitures.

PENALTY IN BONDS (S) = (E) not inserted in (E) as expenses are covered by penal sum in bond which is generally double the sum due, 448.

PENDENT FEE (S) in destinations, *i. e.*, where the fee is in suspense = (E) like the fee on a remainder and contingent remainder, 148, 928.

PENDICLES (S) = (E) appurtenances.

PENSION (E) or parliament, or council, in the Inns of Court, being a meeting of benchers for particular business = (S) not used.

PENURIA TESTIUM (S) *i. e.*, old rule relaxing the number and quantity of witnesses in cases of necessity = (E) no term.

PERAMBULATION (S) old mode of settling marches; obsolete = (E) a similar custom prevails in many parishes and districts.

PEREMPTORY DEFENCES (S) = (E) at C. L. pleas in bar; in Ch. demurrer, plea, or answer, as the case may be, 1073, 1154.

——— PAPER (E) a particular list in the courts of C. L., consisting of business outstanding which will be peremptorily disposed of on the day appointed = (S) business is not classed in the same way, but is distributed in different rolls, as the motion-roll, the summar-roll, etc.

PERFORMANCE OF CONTRACT TO PAY, 461; excuse for non-performance, 465; tender of performance, 466.

PERICULUM (S) = (E) risk.

PERPETUATING TESTIMONY, BILL FOR (E) = (S) diligence to take examinations to lie *in retentis*.

PERPETUITIES, rule against, in (E), 29.

PER QUOD (E) a phrase in a declaration showing that particular damage happened from the injury = (S) not used.

PERSONAL ACTION (E) *i. e.*, an action brought for breach of contract, tort, etc., as distinguished from real actions which are brought to recover real property = (S) included petitory actions, 1058.

——— EXCEPTION (S) = (E) like estoppel in pais.

——— PROPERTY (E) = (S) moveable property.

——— RIGHT OR JUS AD REM (S) *i. e.*, right to complete the title = (E) no general term; chose in action.

PERSONALTY (E) = (S) moveables or moveable rights.

PERTINENTS AND PENDICLES (S) = (E) appurtenances.

PETIT SERGEANTY, a feudal tenure (E) = (S) blanchholding, 15.

PETITION AND COMPLAINT (S) *i. e.*, mode of commencing summary action in Court of Session = (E) at C. L. motion for rule *nisi*; in Ch. motion, 1058.

PETITIONING CREDITOR (E) in bankruptcy = (S) creditor petitioning for sequestration.

PETITORY ACTIONS (S) *i. e.*, seeking to make the defendant pay or do something = (E) no term; personal action, 1058.

PEW (E) = (S) the same; also church seat.

PICKERY (S) *i. e.*, petty theft punishable by fine = (E) petty larceny is obsolete; larceny.

PISCARY, COMMON OF (E) = (S) right of fishing *pro indiviso*, 6, 282.

PLAGIUM (S) *i. e.*, crime of stealing human creatures = (E) kidnapping, child stealing, abduction.

PLAINTIFF (E) = (S) pursuer.

PLAINT (E) writ issued by a plaintiff in a county court = (S) summons, 1169.

PLEA (E) *i. e.*, in an action at C. L. or suit in Ch. = (S) defences, or defences and answers, 1073, 1154.

——— IN ABATEMENT (E) = (S) dilatory or preliminary plea. *See* "Abatement," 1073.

——— IN LAW (S) *i. e.*, short propositions in law, annexed to condescendence or answers, stating the points on which the contention rests = (E) not known, like points on margin of demurrer books, or on appeals in C. L. courts, 1073, 1078.

PLEAD, TO (E) = (S) to give in defences.

PLEADER (E) *i.e.*, one who draws pleadings = (S) one who draws law papers; but pleader is also generally used to denote a counsel who argues in court, not who draws papers.

PLEAS OF THE CROWN (S) *i. e.*, murder, robbery, rape, and wilful fire-raising = (E) the term is not now in use except generally for crimes, 950.

PLED (S) = (E) pleaded.

PLEDGE, sale of pledge, 601; pledgee has no general lien in (E), 598.

PLENE ADMINISTRAVIT, plea of, by executor (E) – (S) plea or exception of exhausted.

PLENISHINGS (S) = (E) furniture.

PLURALITIES in church, 998.

POINDING CREDITOR (S) = (E) execution creditor.

——— THE GOODS (S) = (E) taking the goods under a fi. fa., *i. e.*, levying execution under a writ of *fieri facias*, 1131.

——— THE GROUND (S) = (E) distraining by grantee of rentcharge, or superior landlord; by real creditor, 107.

——— OF STRAY CATTLE (S) = (E) distraining or impounding cattle damage feasant.

POINTS IN DEMURRER BOOK (E) *i. e.*, the short points or arguments to be relied upon in arguing a demurrer, which points must be written in the margin = (S) not used; like pleas in law or other pleadings, 1078.

POOR-LAW generally, 1025.

POOR'S-RATE, as between landlord and tenant, 390; generally, 1025, *et seq.*

——— ROLL (S) = (E) no list is made out, but any poor person can sue in *forma pauperis*, 966.

PORT, owner must repair, in (E), 7; *contra* in (S) *ib.*

PORTION (E) = (S) same; also tocher.

——— NATURAL (E) in city of London, abolished = (S) legitim, 848.

——— satisfaction of legacy by, 711.

PORTIONERS, HEIRS (S) = (E) coparceners, 164, 777.

POSSESSORY ACTION (S) = (E) not used, but certain suits in Ch. for injunction are possessory in their nature; also ejectment at C. L.

POSTEA (E) *i. e.*, the completion of the record reciting what happened after the trial by a jury; the duty of so filling up the record generally devolves on the successful party = (S) not used; the successful party moves the court to apply the verdict.

POSTMAN (E) a barrister appointed to an ancient nominal office in the Court of Exchequer, which gives a certain right of pre-audience over other members of the bar in making motions = (S) not known.

POUND (E) *i. e.*, a place where cattle damage feasant are impounded = (S) not known and not needed, 417.

——— BREACH (E) *i. e.*, breaking open a pound to take cattle there impounded = (S) not used, like breach of sequestration, 417.

POWER (E) given by will or settlement, 291 = (S) faculty; to exercise a faculty (S) is to execute a power (E); illusory appointment of, 294.

——— OF ATTORNEY (E) = (S) as to foreign countries, the same; as to home affairs, a mandate.

——— OF SALE; in mortgage deed, 106; in bond and disposition in security, 106.

PRACTICE (E) as a head of law in digests of law = (S) process.

PRÆCEPTIO HEREDITATIS (S) = (E) enjoyment of real estate by the heir-at-law, under a fraudulent conveyance to him, 781.

PRÆCIPE (E) a short memorandum given in to the office of a Common Law court when applying for a writ of summons = (S) resembling a *partibus*, 1069.

PRÆCIPUUM (S) *i. e.*, the exclusive right of the oldest heir-portioner to a country mansion house = (E) not used, and it does not exist, 166.

PRÆDIAL SERVITUDES (S) *i. e.* affecting heritage = (E) easements and commons, 278, 286.

PRÆPOSITURA OF WIFE (S) = (E) her implied authority to bind the husband for household necessaries, 898.

PRECARIUM (S) = (E) loan.

PRECEDENCE, PATENT of (E) a grant from the Crown to certain barristers, afterwards called Queen's Counsel, giving them a right of pre-audience = (S) not known, there being no Queen's Counsel, 1210.

PRECEPT OF CLARE CONSTAT (S) *i. e.*, writ by superior acknowledging the title of the heir of a vassal = (E) not known on freeholds; admittance in copyholds, 779, 187.

PRECOGNITIONS (S) *i. e.*, examinations of witnesses by an attorney, when written out in counsel's memorial or brief, as a guide at a jury trial = (E) proofs.

——— if before a justice of peace, previous to indictment (S) = (E) depositions of witnesses, 981.

PREDECEASE (S) death of heir or legatee before testator = (E) not used; in such cases legacy, etc., lapses, 700.

PRE-EMPTION, CLAUSE OR CONDITION OF (S) = (E) covenant for pre-emption, 80.

PREFERENCE OF DEBTS BY EXECUTOR, 690.

PRELIMINARY DEFENCE (S) = (E) preliminary plea, as pleas in abatement; to the jurisdiction, 1073.

PREMISES (E) *i. e.*, land and houses, etc., the subject matter of conveyance = (S) same, also subjects.

——— (E) *i. e.*, certain parts of a deed or lease so called = (S) the narrative and also the dispositive clauses, 361.

PREMONITION (S) = (E) notice.

PREROGATIVE COURT, now Court of Probate (E) = (S) commissary court.

PRESCRIPTION (S) = (E) as to lands and land rights, and suits and contracts, Statute of Limitations, 295; as to incorporeal hereditaments; prescription, 309; interruption of a prescription (S) = (E) taking the case out of the Statute of Limitations; positive prescription, 296, 497; *non valens agere*, 301; minority, 304; long negative, 487; triennial, 492; vicennial, 489; quinquennial, 490; septennial, 491; of crimes, 949; of quasi delicts, 515.

PRESENTATION, BOND OF (S) = (E) bail bond. *See* "Bond of Presentation."

PRESENTEE OF PATRON, 993.

PRESENTMENT (E) the representation made by a grand jury in finding indictments, etc. = (S) not used, 957.

PRESES OF MEETING (S) = (E) chairman or president.

PRESTATION (S) = (E) performance, 1.

PRESUMPTION OF LAW (E) *i. e.*, a leaning of the court towards a certain conclusion of fact, where there is no conclusive evidence; when a presumption is not allowed to be rebutted by evidence, it is called a *presumptio juris et de jure* = (S) the same.

PRESUMPTIVE HEIR (S) *i. e.*, the heir-at-law while his ancestor is living = (E) the same term means he who, though not certain to be heir, would succeed if the ancestor died immediately, as a daughter till a son is born, 752.

PRETIUM AFFECTIONIS (S) = (E) seldom used, except in specific performance of sale of chattels, 484.

PRINCIPAL AND AGENT, appointment of agent, 610; agent of corporation, 611; agent to sign deed, 612; factor's right of pledge, 614; London brokers require license, 615.

PRISONER FOR CRIME. *See* "Crime," 940, *et seq.*; interrogating, 952.

PRIVILEGED DEBTS (S) = (E) not used, but some debts have priority in case of death, though they are not so extensive; funeral expenses, 685; servants' wages, 686; landlord's rent, 687.

——— DEEDS (S) = (E) not known, for holograph deeds or wills have no privilege.

——— SUMMONSES (S) = (E) not known. No summons is privileged, but actions on bills of exchange are now privileged. *See* "Bills."

PRIVITY (E) condition of one who is a privy = (S) seldom used; as to law agent, 1224.

PRIVY (E) *i. e.*, a person who directly contracts with another, as distinguished from a party remotely connected = (S) not used; in bills of exchange, 552.

—— COUNCIL, judges of, 1049.

PROBABILIS CAUSA (S) = (E) good ground of action or suit. In actions in *forma pauperis*, counsel certifies as to this, 1212.

PROBATE (E) = (S) confirmation of a testament testamentar. *See* "Will," "Executor," and "Administrator," 680.

PROCEDENDO (E) a writ from a superior court to an inferior, ordering it to proceed and dispose of the case = (S) not used; remit.

PROCESS (S) *i. e.*, the whole papers and productions in a cause = (E) no term. The productions, which in (S) would form part of the process, are kept in the private custody of the respective parties, and also in

Ch., unless produced or lodged with clerk of records and writs on motion of the opposite party. Instead of borrowing process to prepare answers, etc., each party must send a copy of his pleading to the other and allow inspection of any deed, etc., so that there is no lodging the pleadings, etc., in court at all. But in Ch. pleadings are all filed with clerk of records and writs, 1084, 1156.

PROCESS (S) as a head of law in digests, etc. = (E) "practice" is the head of law.

——— (E) *i. e.*, the execution and service of writs in actions and suits = (S) incident diligence.

——— CAPTION (S) *i. e.*, warrant of imprisonment for not returning papers in a process = (E) not known in like circumstances; but resembles an attachment.

——— CLERK OR CLERK TO THE PROCESS (S) = (E) at C. L. not known; but in Ch. clerks of records and writs.

PROCLAMATION OF BANNS (S) = (E) publication of banns, 862.

——— OF OUTLAWRY (E) = (S) fugitation or outlawry, which, however, is confined to criminal procedure.

PRO CONFESSO, DECREE (S) = (E) in Ch. same; at C. L. judgment by default.

PROCTOR (E) the agent who acts in the Ecclesiastical Courts as an attorney or solicitor does in Civil Courts = (S) law-agent or procurator, etc. 1232.

PROCURATOR (S) or country law-agent = (E) attorney or solicitor, 1219.

——— FISCAL (S) *i. e.*, public prosecutor of the district = (E) no such officer, there being no public prosecutor.

PROCURATORY OF RESIGNATION (S) = (E) in copyhold, surrender; in freeholds, not known.

PRODUCTION (S) *i. e.*, a document produced in process or before a commissioner = (E) if before a commissioner or examiner, an exhibit; if in court, a document, etc., produced.

——— OF DEEDS, etc., in suit (S) = (E) same at C. L.; but each party keeps his own deeds. In Ch., deeds are produced with clerk of record and writs, 1084, 1156.

PROFITS, MESNE (E) = (S) violent profits; also profits *bona fide* enjoyed, 296.

PROGRESS OF TITLES (S) = (E) abstract of title, *i. e.*, abridgment of titles, the originals being kept by vendor till sale completed, 323, 366.

PROHIBITION (E) *i. e.*, writ from a superior court, prohibiting suit or action in certain cases, where judge goes *ultra vires* = (S) action of suspension and interdict; also declarator.

——— AGAINST ALIENATION, CLAUSE OF (S) = (E) clause against alienation; if it is a term or lease "Covenant not to assign;" in entails, 32, 52; in trusts, 216; in marriage settlements, 931.

——— TO SUBFEU (S) = (E) not known in freeholds, 80.

PROHIBITORY CLAUSE in entail, *i. e.*, prohibiting alienation or contracting debt (S) = (E) condition not to alienate; effect of an entail, 28, 32.

PRO INDIVISO RIGHT (S) = (E) joint tenancy, also tenancy in common.

PROLOCUTOR (E) or speaker of the Convocation = (S) Moderator of the General Assembly, 991.

PROMISE (E) = (S) included in obligation; in contracts, 431; to pay money, proof of, 451.

PROMOTER (E) *i. e.*, party instituting a suit or setting the court in motion, used chiefly in Ecclesiastical Courts = (S) pursuer, informer.

PROOF (S) = (E) evidence; to lead proof (S) = (E) to produce evidence.

—— BEFORE ANSWER (S) = (E) at C. L., issue of fact tried before issue in law, 1078.

—— (E) when written in counsel's brief = (S) precognitions.

PROPONE (S) as to propone defences = (E) to plead a plea.

PROPONED AND REPELLED (S) = (E) plea stated and overruled.

PROPRIETOR (S) = (E) not used technically; the word varies with the kind of estate, as a freeholder, a tenant for life, a termor.

PROROGATION (S) in judicial proceedings = (E) enlargement of time.

—— OF JURISDICTION (S) = (E) jurisdiction by consent.

—— OF A LEASE (S) = (E) renewal of a lease. Continuing or granting a lease for a further term (S) is called in (E) renewal.

PROSECUTOR, PUBLIC (S) *i. e.*, Lord Advocate and his deputes and procurator-fiscals = (E) no such officers, 944.

PROTECTION OF WITNESS (S) *i. e.*, the witness requires an express protection from the court against apprehension, which protection is obtained on oath of credulity (affidavit E) and is recorded in the books of court, and lasts the number of days therein specified = (E) privilege of witness. In (E) a witness in attending court is impliedly privileged from arrest *eundo morando et redeundo*, 1092.

PROTECTOR OF ESTATE TAIL, *i. e.*, person whose consent is required to bar the entail in some cases (E) = (S) not known, 34.

PROTEST (S) a mode of giving solemn notice by notary = (E) not known except in international transactions.

—— OF BILLS OF EXCHANGE (S) = (E) same, 557.

PROTESTATION (S) = (E) judgment of *non prosequitur*, judgment for want of plea, 1115.

PROUT DE JURE, PROOF (S) *i. e.*, evidence by witnesses, or any other mode competent = (E) evidence, which may be of any kind competent, and is not restricted to written evidence.

PROVINCE (E) *i. e.*, the circuit or extent of an archbishop's jurisdiction = (S) not known.

PROVING THE TENOR, ACTION OF (S) = (E) a bill in Ch. for establishing or setting up lost documents. As to inferior securities, bills, etc., at C. L., their loss can in many cases be supplied by the party giving secondary evidence of their contents, which is competent after he has served a notice to produce them on the party who naturally has the custody of the originals.

—— A WILL (E) in the Probate Court = (S) applying for confirmation of a testament testamentar.

PROVISIONS TO CHILDREN (S) = (E) the same, also portions to children.

PROVISO, TRIAL BY (E) a mode whereby a defendant insisted upon a trial in the action when the plaintiff unduly delayed; now known as a notice to try = (S) not used.

PROVOST (S) = (E) Mayor. Lord Provost (S) = (E) Lord Mayor.

PUBERTY (S) *i. e.*, from 12 or 14 to 21, AND PUPILLARITY up to 12 in females and 14 in males = (E) no subdivision of infancy.

PUBLICATION OF BANNS (E) = (S) proclamation of banns, 862.

—— OF DEPOSITIONS (E) *i. e.*, giving out copies = (S) not used.

PUBLICATION OF WILL (E) *i. e.*, a mode of executing a will, not now necessary.

PUBLIC BURDENS ON LAND (S) = (E) rates and taxes, *i. e.*, parochial rates and parliamentary taxes; charges on land.

——— HOUSES, license as to, 1038; opening on Sundays, 1039.

——— PROPERTY (S) = (E) rights of Crown.

——— PROSECUTOR (S) who is the Lord Advocate, assisted by advocates-depute and procurators-fiscal = (E) not known, but Attorney-General may act as such, 944.

——— RIGHTS (S) = (E) generally all freehold estate in (E) is held public, subinfeudation being prohibited, 18, 198.

PUIS DARREIN CONTINUANCE, PLEA (E) *i. e.*, a plea added to the record, containing something which has happened since the record was made up = (S) plea or minute of *res noviter veniens ad notitiam*, 1081.

PUPILLARITY. *See* "Puberty."

PUR AUTRE VIE, ESTATE (E) *i. e.*, if B has an estate for the life of A, then B has an estate *pur autre vie* = (S) included in liferent, 55, 56, 58.

PURCHASER (S) = (E) the same.

——— (E) = (S) singular successor; one who acquires otherwise than by succession, 755.

PURGING AN IRRITANCY (S) *i. e.*, by act of the tenant = (E) waiver of forfeiture, which, however, is the act of the landlord, not the tenant.

PURSUER (S) = (E) plaintiff.

PUTTING TO SILENCE (S) *i. e.*, action of declarator of, raised by a party who is calumniously reported by another to be married to him or her = (E) suit of jactitation of marriage.

QUADRIENNIUM UTILE (S) *i. e.*, four years after majority, when the major may quarrel or reduce deeds to his prejudice made when a minor = (E) no fixed time, ratification in some contracts being presumed, if he do not in reasonable time disaffirm them; in others, he can set up infancy in defence, unless a ratification in writing is proved against him, 813.

QUANDO ACCIDERINT, JUDGMENT OF (E) *i. e.*, a judgment obtained against an executor, under which he is bound to pay when assets come to hand = (S) not used.

QUANTI MINORIS ACTIO (S) *i. e.*, as a head in law = (E) mistake in quantity or misdescription.

QUANTUM MERUIT (E) *i. e.*, according to the value proved = (S) the same; value of services rendered.

QUARANTINE (E) *i. e.*, the right of a widow to remain forty days after the husband's death till her dower is assigned = (S) not known, but she can claim aliment from the executor, 912.

QUARE CLAUSUM FREGIT, TRESPASS (E) *i. e.*, an action for trespassing on a close or inclosed ground belonging to the plaintiff = (S) action for trespassing on land.

——— IMPEDIT (E) a real action, by which a patron of an advowson establishes his right = (S) included in action of declarator.

QUARREL A DEED, TO (S) = (E) to impeach a deed.

QUARTER DAYS, THE USUAL (E) viz., Lady-day, 25th March; Midsummer-day, 24th June; Michaelmas-day, 29th Sept.; and Christmas-day, 25th Dec. = (S) not used; the two usual half-yearly days are, Whitsun-

day, 15th May, and Martinmas, 11th Nov.; but two other terms are often added by convention, viz., Candlemas, 2d Feb.; Lammas, 1st Aug. 398.

QUASI CONTRACT (S) = (E) implied contract.

——— DELICT (S) = (E) tort, 506.

QUEEN'S BENCH, COURT OF (E) *i. e.*, a common law court = (S) included in Court of Session and Court of Justiciary, 940, 1055.

——— its jurisdiction, 1055.

——— COUNSEL (E) certain counsel entitled to pre-audience by patent from the Queen = (S) not known; the only two counsel having like pre-audience are the Lord Advocate and Solicitor-General, 1210.

QUESTIONS OF FACT WITHOUT PLEADINGS (E) *i.e.*, issues agreed on by the parties without any pleadings being prepared, which a common law court will decide by means of a jury = (S) not known, and not competent, 1116.

QUIA EMPTORES, STATUTE OF, *i. e.*, prohibiting subinfeudation in (E), 14, 18 = (S) no such statute, *ib.*

QUINQUENNIAL PRESCRIPTION (S) = (E) not known; a six years' or 20 years' limitation applies, according as the contract is or is not under seal, 490.

QUI TAM ACTIONS (E) *i. e.*, actions in which an informer sues for a penalty incurred under a penal statute = (S) not used; action for a penalty, or penal actions.

QUITRENT (E) a rent, the payment of which frees the tenant from services.

QUOD RECUPERET (E) *i. e.*, a judgment for the plaintiff on some pleas of abatement = (S) interlocutor repelling a dilatory plea, 1073.

QUONIAM ATTACHIAMENTA (S) one of the ancient books of the law of Scotland.

QUOUSQUE (E) lord of manor seizing the copyhold quousque, where no heir or devisee of a deceased copyholder appears (E) = (S) declarator of non-entry, 189.

QUO WARRANTO (E) *i. e.*, a writ to try the legality of an appointment to a public office, which is alleged to be usurped = (S) included under action of declarator.

RABBITS, right of a tenant to kill, 395.

RAILWAY CLAUSES CONSOLIDATION ACT (E) *i. e.*, 8 & 9 Vict., c. 20 = (S) the 8 & 9 Vict., c. 33.

RANKING AND SALE, ACTION OF, which is raised by a creditor holding a real security and in possession, to sell the heritable property of an insolvent person when the rights of the respective creditors are ranked and the proceeds divided (S) = (E) bill in Ch. for an account, or for redemption, or foreclosure, or for a sale of real estate, when the Court of Ch. orders an account, and a sale, if necessary, when the different securities are marshalled, 791.

——— OF CREDITORS (S) = (E) priority of debts; marshalling of creditors at death, 688.

RAPE, complaint in, 986; nature of consent, 987; infant's capacity to commit, 988.

RATIFICATION BY MINOR (S) = (E) confirmation by infant of voidable contract, 813.

——— BY WIFE OF DEEDS (S) = (E) acknowledgment by a married woman under the Fines and Recovery Act, 887; as to separate estate, 921.

REAL ACTIONS (S) *i. e.*, an action to recover heritable and also moveable property to which one has a real, and not merely a personal right = (E) ejectment is a similar action; also trover and detinue.

——— ACTIONS (E) *i. e.*, three actions at C. L., so called, viz., dower, writ of right of dower, quare impedit = (S) the term is more extensive. See last head.

——— AND PERSONAL (E) = (S) heritable and moveable; what are, 715; leases, mortgages, etc., 716.

——— BURDEN (S) = (E) charge on land.

——— CHATTELS (E) *i. e.*, chattel interests issuing out of or annexed to real estate, as leases for years, estates of elegit, mortgages, and which generally go to the executor = (S) no such distinction, these being heritable property, 715.

——— CONTRACT (S) *i. e.*, which requires possession of the goods to make contract binding, as loan, deposit, etc. = (E) not used, 442.

——— RIGHT (S) *i. e.*, the fullest right or *jus in re*, which a person can have to property = (E) both the legal and equitable estate.

REALTY (E) = (S) heritage.

REASONS OF ADVOCATION AND SUSPENSION (S) = (E) points to be argued in an appeal; also grounds on moving for a certiorari.

REBUTTER (E) *i. e.*, a pleading of a defendant in answer to the plaintiff's surrejoinder = (S) revised answers, 1074.

RECALLING AN INHIBITION (S) = (E) not known, there being no inhibition, 1134.

——— AN INTERDICT (S) = (E) dissolving an injunction.

——— SEQUESTRATION (S) = (E) annulling adjudication of bankruptcy, 1175.

RECAPTION (E) a retaking of goods, or of a child, etc., *brevi manu*, which the person entitled can do, so long as no breach of the peace is created = (S) not used; taking *brevi manu*.

RECEIPT, STAMPED, how far evidence of money paid, 462; on back of bill of exchange, 563; on back of purchase deed, 362.

RECEIVER (E) *i. e.*, an officer appointed by the Court of Chancery to draw the rents of real estate, etc., which is the subject of a suit, chiefly appointed in suits as to infants and persons deceased = (S) judicial factor. *See* "Factor."

RECEIVING STOLEN GOODS (E) = (S) reset of theft.

RECITAL (E) in a deed or will = (S) narrative.

RECLAIMING (S) = (E) appealing, rehearing.

——— DAYS (S) *i. e.*, time allowed to appeal to the Inner House from the Lord Ordinary, which is twenty-one days as to interlocutors on the merits, and ten days as to other interlocutors = (E) time to appeal in Ch.; time to suggest error at C. L. 1054, 1056.

——— NOTE (S) *i. e.*, petition of appeal to Inner House from a decree of the Lord Ordinary = (E) in Ch. a petition of appeal; at C. L. a suggestion of error, 1056.

RECOGNISANCE (E) a kind of bond entered into before a court of record conditioned to do some act = (S) bond of judicial caution, 130, 688, 940; also juratory caution.

RECOGNISOR (E) he who enters into a recognisance.

RECOMMENDATION, LETTER OF (S) = (E) a representation as to the credit of a third party must be in writing, and signed by party, 620.

RECOMPENSATION (S) = (E) a set-off against a set-off.

RECONVENTION (S) *i. e.*, where a foreigner sues in (S) he can be sued in turn there by the defender for any counter claim = (E) not used; attorning to the jurisdiction.

RECORD CLOSED (S) the closing takes place before the Lord Ordinary = (E) joinder of issue, both at C. L. and Ch., which is done by the parties themselves, 1077, 1157.

——— COURT OF (E) those courts which enrol the proceedings on parchment, and having, as incident to their jurisdiction, the power of fining and imprisoning for contempt of their authority = (S) not used.

——— DEBTS OF (E) debts due under a judgment, decree, rule, or order of a court, and which are privileged over special and simple contract debts in administering a deceased person's estate = (S) not known; debts under decree of constitution; there is no such privilege, 433, 688.

——— TRIAL BY (E) a trial of an issue of *nul tiel* record, *i. e.*, whether a certain record exists, which is not tried by a jury but by inspection of the record itself = (S) not used, 1079.

RECORDER (E) *i. e.*, a judge; generally a practising barrister, who tries minor crimes in burghs and cities = (S) included under sheriff, 940.

RECOVERY (E) an ancient mode by which a tenant in tail barred the estate tail = (S) not known; the right to disentail a strict entail was first conferred in 1848, 28.

——— AND RETENTION, RIGHT OF (S) = (E) right to pursue and seize, as a distress for rent, goods fraudulently removed from the premises; rent must have fallen due; removal must be fraudulent, or with intent to avoid a distress, 413.

RECTOR (E) an incumbent of a spiritual living = (S) minister, 994.

REDDENDO (S) *i. e.*, a clause in charters specifying the feu-duty to be paid = (E) not known in conveyance of freeholds; in leases, reddendum or reservation of rent.

REDDENDUM IN LEASE (E) = (S) included in clause of rent, 377.

REDEEMABLE RIGHTS (S) = (E) mortgages.

REDEMPTION, EQUITY OF (E) = (S) reversion.

REDUCTION (S) of deeds, decrees, etc. = (E) setting aside of a deed, judgment, etc., in Ch.

——— ACTION OF (S) = (E) bill in Ch. to set aside the deed or document on the ground of fraud, etc. No direct action at C. L. lies, but fraud, duress, etc., is a good plea or defence;—in error, 453.

——— IMPROBATION, ACTION OF (S) = (E) bill in Ch. to set aside on the ground of forgery.

——— REDUCTIVE, ACTION OF (S) = (E) bill of review of a decree setting aside a deed.

RE-ENTRY, PROVISO FOR, IN LEASE (E) = (S) irritancy, 426.

REFER, TO (E) = (S) to remit.

REFERENCE OF A CAUSE (E) = (S) judicial reference; also remit, as to an accountant.

——— TO AN ARBITER (S) = (E) same; also submission to arbiter.

——— TO THE MASTER (E) *i. e.*, a matter of damage or debt to be estimated by the master of the court.

——— TO OATH (S) *i. e.*, a competent mode of staking the merits of a case

on the oath of the opposite party, and abiding by the result = (E) not known, 481, 1086.

REGIAM MAJESTATEM (S) *i. e.*, old legal work, supposed to be a copy, or the original of Glanvill (E).

REGISTER OF DEEDS (E) no general register, 366, 370, 324.

REGISTERED JUDGMENT, is a charge on land in (E), 134; *contra* in (S), 1119, 1135.

REGISTRATION OF BIRTHS, DEATHS, AND MARRIAGES, is compulsory by Stat. (S) *i. e.*, by 17 & 18 Vic., c. 80; 18 Vic., c. 29; 19 & 20 Vic., c. 119 = (E) the same by 6 & 7 W. IV., c. 86, and subsequent statutes.

——— DECREE OF (S) *i. e.*, decree, proceeding without the necessity of any action, upon an obligation in a deed in which a clause of consent to registration for execution was inserted = (E) not known as to deeds, 370, 480; but in warrant of attorney or cognovit, or consent to a judge's order, the same effect is produced by entering up judgment, 1117.

——— OF DEEDS (S) = (E) same, but there is no general register, 366, 370; of entails, 54; deeds affecting lands in Middlesex, York, Hull, 54, 368; of mortgages, 94; of bonds and dispositions in security, 93; of assignment of mortgages, 96; of bills of sale, 540; of protested bills of exchange, 567; of judgments, 1119, 1135.

REGRESS, LETTERS OF (S) *i. e.*, ancient writ of a superior re-admitting a vassal who had wadsetted his lands = (E) not known.

REHABILITATION (S) = (E) restoration, reinstating.

REHEARING (E) *i. e.*, the hearing of a case over again, after it has been decided, which is allowed in courts of equity, though not of law = (S) not competent; but an action of reduction of the decree may be raised in some cases. *See* "Review."

REI INTERVENTUS (S) = (E) not used; part performance of a contract; acting on faith of an imperfectly executed contract being entered into, so as to estop opposite party from taking advantage of such defect, 376.

REJOINDER (E) *i. e.*, the pleading of a defendant in answer to the plaintiff's replication = (S) revised defences, 1074.

REJOINING GRATIS (E) *i. e.*, a condition imposed on a defendant, who has received some favour from the court to lose no further time in rejoining = (S) not used.

RELATE BACK TO (E) = (S) draw back to.

RELATOR (E) *i. e.*, the individual on whose suggestion or information a suit by the Attorney-General on behalf of a charity, etc., is filed = (S) informer or private prosecutor; but in like cases an ordinary action of declarator is the remedy.

RELEASE (E) deed discharging a right of action, or enlarging, transferring, or abridging an estate = (S) as to debts, discharge; as to estates, not used.

——— OF CONTRACTS (E) = (S) extinguishment; and discharge, 472.

RELEASEE (E) he to whom a release is made.

RELEVANT (S) = (E) "good on demurrer." A *plea to the relevancy* in (S) is in (E) a demurrer; but at C. L. and in Ch. the party demurring admits all the allegations of fact in the pleading demurred to, though a court of C. L. may now grant leave to demur, and to plead at the same time, *i. e.*, demur without admitting all the facts. When a pleading in

(E) is relevant, it is said to be "not demurrable." To plead in (S) that the summons is irrelevant, is in (E) "to demur to the declaration;" so to plead that the defence in (S) is irrelevant, is in (E) "to demur to the plea," and so on, 1077, 1078, 1154.

RELIEF, (E) a fine paid by heir of copyholder on admittance, and sometimes of a freeholder = (S) same, 21, 179.

——— (S) payable on entry of heir = (E) in copyhold the same; also heriot, 179; in freeholds, scarcely known.

——— between cautioners (S) = (E) contribution.

——— between heir and executor (S) = (E) exoneration.

——— between cautioner and principal (S) = (E) contribution sued for by action for money paid.

RELOCATION, TACIT (S) = (E) as to leases, continuance of tenancy by holding over, 421; as to servants, implied renewal of hiring, 830.

REMAINDER (E) *i.e.*, what remains of the estate after a life estate or other particular estate is given away = (S) fee, 62, 140.

——— and reversion, 143; vested remainder, 144; rule in Shelley's case, 145, 146; contingent remainder, 147, 150; trustees to preserve contingent remainder, 153.

REMAINDERMAN (E) *i. e.*, the person entitled to real estate, after some particular estate, as a life estate, has determined = (S) fiar.

REMANET (E) *i.e.*, a trial set down in the list, but which has not been disposed of for want of time, and therefore left until next sittings or assizes = (S) not used.

RE MERCATORIA, WRITINGS IN (S) which are privileged as to proof, and as to the right to rebut their effect by parole evidence = (E) no such distinction; all writings, letters, etc., must be proved by handwriting, authority, etc., and can generally be rebutted by parol evidence, subject to qualifications, 447.

REMISSION OF CRIME (S) = (E) pardon.

REMIT, A (S) = (E) a reference.

——— TO (S) = (E) to refer.

REMOVING OF TENANTS, JUDICIAL (S) = (E) execution on judgment of ejectment.

——— VOLUNTARY (S) = (E) quitting possession.

RENDER (E) *i. e.*, the giving up of a principal by his bail at the time appointed = (S) producing the party by his cautioner.

RENOVATION OF LEASE (S) = (E) renewal of lease.

RENT, 398, 468; prescription as to rent on verbal lease, 492; order of priority on an executor's paying rent. *See* "Landlord and Tenant."

——— CHARGE (E) = (S) infeftment of annual rent; it is the converse of ground annual, 265.

——— in copyhold estate = (S) feu-duty, 179.

——— SERVICE, *i.e.*, rent payable to reversioner by tenant (E) = (S) rent, 141, 142, 262.

RENTAL RIGHT (S) = (E) lease at a nominal rent.

RENUNCIATION OF REDEEMABLE RIGHT (S) = (E) release; reconveyance.

——— OF HEIR (S) = (E) not known, because not needed; an heir cannot renounce or disclaim, for the law vests his ancestor's estate in him whether he will or not, 779.

——— OF LEASE, TACK, FEU, etc. (S) = (E) surrender of lease; release of the fee.

REPAIRS by tenant for life, 64; by tenant for years, 391.

REPARATION (S) = (E) damages for a tort.

——— for quasi delicts, 510.

REPEATING A SUMMONS (S) *i. e.*, a mode by which a defender, who can only support his defence by a cross action, is allowed, instead of raising a separate summons and waiting till it can be called and then conjoined, to repeat it at once, and an interlocutor to that effect is pronounced = (E) not allowed in the same way, but the judge may consolidate actions or suits.

REPETITION, ACTION OF (S) = (E) action for money had and received, 453.

REPLEADER (E) *i. e.*, a writ awarded by a court of Common Law, when it is found that the issues of fact have been irrelevant = (S) included in new trial.

REPLEVIN, ACTION of (E) *i. e.*, an action brought by one whose goods have been improperly distrained or taken, to try the validity of such distress = (S) recall of sequestration of tenant's goods; also action of restitution, 1058.

REPLICATION (E) *i. e.*, the plaintiff's pleading in answer to the defendant's plea = (S) revised condescendence, 1074.

REPLY, RIGHT OF (E) *i. e.*, the right of him who begins in a trial, to reply in answer to the other party's case = (S) the same; but there is in general no right of reply, 977, 1087, 1088.

REPONING (S) = (E) restoring a party who applies to set aside a judgment, etc., which prejudices him; or letting him in to defend, 1071.

REPROBATOR (S) = (E) discrediting a witness.

REPROBATORY PROOF (S) = (E) evidence impeaching credit of a witness.

REPUBLICATION OF WILL (E) *i. e.*, giving validity to a former will; not now necessary.

REPUTED OWNERSHIP (S) = (E) same in bankruptcy, also goods in order and disposition of bankrupt, 1179.

REQUISITION (S) = (E) demand.

RESCISSORY ACTIONS (S) = (E) bill in Ch. to set aside a deed, etc.; but defence of fraud, duress, etc., is also good at C. L., without the necessity of a cross action, 1058.

RESERVATION IN LEASE OR DISPOSITION, clause of (S) = (E) exceptions, being part of that part of the deed called the premises, 361; reservation is only used with reference to rent in leases.

RESERVED BURDEN (S) as where a vendor or grantor dispones land, reserving part of the price, or a sum, as a burden on the lands = (E) declaring a debt a charge on the land, 272, 327.

RESET OF THEFT (S) = (E) receiving stolen goods.

RESIDENCE of incumbent of parish (E) = (S) manse, 1013.

RESIDUARY LEGACY (E) = (S) same; also universal legacy; executor's claim to residue, 683; lapsed legacies fall into residue, 701, 722, 725.

RESIGNATION (S) = (E) surrender of a copyhold, 185; in freeholds not known, 20.

——— AD REMANENTIAM (S) = (E) surrender of a copyhold to the use of the lord, 185.

——— IN FAVOREM (S) = (E) surrender of a copyhold to the use of a purchaser, 185.

RES JUDICATA (S) = (E) same; known at C. L. as plea of judgment recovered, to which opposite party may reply, *nul tiel* record, 1079.

RES NOVITER VENIENS AD NOTITIAM (S) = (E) defendant at C. L. may add new matter by plea puis darrein continuance, 1081; or it may be ground for new trial. Plaintiff in general may withdraw his pleading before verdict, and deliver a fresh pleading, or apply for new trial after verdict. In Ch. fresh matter is introduced by supplemental bill or cross bill.

—— NULLIUS (S) = (E) derelict; things lost.

—— SACRÆ (S) = (E) not used; such as utensils of the church.

RESOLUTIVE CLAUSE (S) = (E) clause of forfeiture and gift over; effect of, in entail, 28, 32.

RESPONDEAT OUSTER (E) *i. e.*, a judgment for the plaintiff on some pleas in abatement = (S) interlocutor repelling a dilatory plea, 1073.

RESPONDENT (S) *i. e.*, defender in cases commencing with petition = (E) defendant; in appeals from inferior courts, the term "respondent" is also used.

RESTING-OWING (S) = (E) indebted.

RESTITUTIO IN INTEGRUM (S) = (E) action of trover, if for goods wrongfully possessed; action for money had and received, if for money paid by mistake, 454.

——— AGAINST FORFEITURE (S) = (E) relief against forfeiture.

——— OF MINORS (S) = (E) power to revoke and set aside deeds and contracts made in infancy, 814.

RESTITUTION (E) a writ in a criminal court to recover goods stolen after the conviction of thief; or, in a civil court, to recover costs after judgment of reversal = (S) used in a more extensive sense. See other heads.

——— OF CONJUGAL RIGHTS (E) = (S) action of adherence, 881.

RESTRICTIONS on alienation by tenants in tail, 32; on purchaser of land, 79; on *cestui que trust*, 216; in marriage settlements, 921, 931.

RESULTING TRUST (E) *i. e.*, a trust that arises by operation or construction of law = (S) not recognized to the same extent, 220.

RETAINER OF ATTORNEY (E) = (S) mandate, 1222.

——— OF DEBTS (E) *i. e.*, where an executor retains part of the assets to pay a debt due to himself = (S) not used, 690.

RETENTION (S) = (E) lien; of goods sold, 531; of goods generally, 596; in pledge, 598.

RETOUR (S) = (E) return to writ of inquisition.

RETROCESSION OF LEASE (S) = (E) reassignment.

REVERSER (S) (obsol.) now debtor in a bond or real security = (E) mortgagor.

REVERSION (E) *i. e.*, what reverts to owner of fee-simple after he gives away a life or other particular estate = (S) fee, 61, 140.

——— incidents of, 141.

——— RIGHT OF (S) = (E) equity of redemption.

REVERSIONER, (E) *i. e.*, one who has the reversion = (S) fiar, 140.

REVERTER (E) = (S) escheat; reverter to lord of freehold estate or escheat, 3.

REVIEW (S) = (E) appeal in Ch. At C. L. a suggestion of error may be brought to a higher court.

——— OR REHEARING (E) in Ch. a rehearing is allowed by the same judge; but not at C. L. = (S) no judge or court can review its decrees or interlocutors. But an action of reduction of the decree may be raised afterwards in some cases.

REVISING BARRISTER (E) *i. e.*, a barrister appointed by a judge, who revises

the list of voters and disposes of objections = (S) the duty is done by sheriffs, 1037.

Revivor (E) *i. e.*, the writ by which an action at law is continued by or against the executor of one of the parties who dies during the action = (S) transference.

——— Bill of (E) *i. e.*, a bill continuing a suit in Chancery after the death of a party.

Riding Interest (S) = (E) intervening of creditors who claim a share of the fund due to their debtor.

Riens per Descent (E) *i. e.*, a plea by an heir who is sued for an ancestor's debts that there is no land to furnish assets = (S) not used, 781.

Riot (E) = (S) mobbing.

Risk of goods sold, 526; in goods deposited, 604.

Road or Way, Servitude of (S) = (E) right of way; an easement.

Rogue Money (S) *i.e.*, cost of public prosecutions = (E) included in county rate.

Rolls (S) of court, which are subdivided into various rolls, as the calling lists, Inner and Outer House rolls, the summar roll, the long roll, the short roll, etc. = (E) cause lists. They are not in general printed.

——— Master of the (E) one of the judges of the Court of Chancery. *See* "Master."

Roup (S) = (E) auction.

——— sale of goods by, 537; sale of land by, 330.

Rubric of a Reported Case (S) = (E) marginal note.

——— of Statute (S) = (E) not now used; title of the statute.

Rule Nisi (E) *i. e.*, a motion for a rule *nisi* is an application for leave to do or obtain something, unless the opposite party can show cause to the contrary; if no cause, or none sufficient, is shown, the rule is made absolute; if otherwise, it is discharged. Most of the business in courts of C. L. takes this form = (S) same, but confined to motions for new trials; in other cases the business is done by way of petition or minute.

Runrig Lands (S) *i. e.*, where each has an alternate ridge = (E) not known, 169.

Sabbath (S) = (E) Sunday, 460.

Sacrilege (E) = (S) theft of things sacred.

Sale of Goods; Statute of Frauds, 520; accepting part of goods, 521; earnest, 522; writing signed by party, 523; offer and acceptance, 524; when property in goods passes, 525; risk of goods sold, 526; creditors of seller, 527; creditors of buyer, 528; goods in hand of third parties, 529; seller's lien, 530; general lien, 531; sub-sale, 532; stoppage in transitu, 533; seller re-selling goods, 534; action for not delivering goods, 535; action for price, 536; sale by auction, 537; damages for non-delivery, 538; sale of stolen goods, 539; bill of sale, 540; sale of furniture by tenant, 541; proof of payment, 542.

—— of Land, 107; specific performance of agreement, 318; a good title implied, 319; warranty of land, 320; abstract of title, 323; expense of conveyance, 326; vendor's lien, 327; purchase in name of another, 328; sub-vendee purchasing, 329; sale by auction, 330.

Salmon Fishing belongs to public in (E) 6; *contra* in (S), to Crown, *ib.*

Sanctuary, Privilege of (S) which is granted systematically to all who live within the precincts of the palace of Holyrood, and who have recorded

their names, and obtained a certificate from the bailee = (E) privilege from process in Queen's palace. But there is no privileged place set apart for debtors resorting there, 1127.

SASINE (S) = (E) seisin. In (E) seisin, *i. e.*, where a substantive act of delivery was necessary to complete the right to freehold property, no separate instrument of sasine was necessary, nor was a notary-public; a memorandum of the fact was merely indorsed on the back of the disposition, 358, 363.

SATISFACTION ON THE ROLL (E) *i. e.*, an entry made on the record in an action at law, stating that the debt is extinguished = (S) not used.

——— OF CONTRACTS (E) = (S) *acceptilatio*, 474.

——— accord and satisfaction, 474.

SCANDAL (E) *i. e.*, scandal or impertinence in a pleading in Ch. is ground of exception = (S) not used.

SCHEDULE or citation of a messenger-at-arms in executing a summons (S) = (E) copy given on service.

SCHEME OF DIVISION (S) = (E) taking the accounts.

SCHOOLS, PAROCHIAL, *i. e.*, a school established by statute in every parish, and supported by assessments levied on heritors and tenants = (E) not known, 390.

SCIENTER (E) *i. e.*, that part of a declaration in an action of damages alleging the knowledge of the defendant of the wrong, or the cause thereof = (S) not used.

SCIRE FACIAS (E) *i. e.*, a secondary writ by which a judgment against a person deceased, or a company, is transferred against the executor or a shareholder = (S) not used; transference in case of death of a party.

SCORING AN INDORSATION, etc. (S) = (E) cancelling an indorsement.

——— THE PARTIBUS (S) = (E) not used.

SEA, right to shore, 2; bathing in, 2; seaweed, 2.

SEAL (E) which is necessary in executing deeds = (S) not known, because not needed, 336.

SEARCH OF INCUMBRANCES (S) = (E) the same, and to some extent is necessary in different offices, as the case may be, 367.

SEARCHER OF INCUMBRANCES (S) persons paid for searching the register for incumbrances = (E) not known.

SEA-SHORE, belongs to Crown, 2; if shore is boundary, belongs in (S) to adjoining owner, 2 *n.*

SEAT IN CHURCH (S) = (E) same, or pew, 1007.

SECONDARY CREDITOR (S) *i. e.*, creditor under a postponed security = (E) not used, but known in marshalling securities, 786.

SECURITY FOR COSTS (E) *i. e.*, a right of a defendant to call on a plaintiff residing out of the jurisdiction to give security for costs = (S) right to have a mandatory sisted, 1114.

SEDUCTION OF MARRIED WOMAN (S) = (E) criminal conversation, 513.

——— OF UNMARRIED WOMAN (S) = (E) the same, 512; woman can sue seducer in her own right in (S), 512; contra in (E), but her master or mistress may, 512.

SEIGNORIES (E) = (S) superiorities, 256.

SEISIN (E) = (S) sasine or infeftment, 358.

SEMIPLENA PROBATIO (S) a loose kind of proof which generally required to be eked out with an oath, now supposed to be abolished (S) = (E) not

used, but such evidence might be sufficient according to circumstances, 1104.

SENATOR OF THE COLLEGE OF JUSTICE (S) a name given to the judges of the Court of Session. The College consists of the advocates and law agents, who are all exempt from a local tax called the annuity-tax, 1219.

SEPARATE ESTATE OF WIFE (E) = (S) same, 920, 897.

SEPARATION AND ALIMENT, ACTION OF (S) = (E) suit or petition for judicial separation in Divorce Court, 878.

——— JUDICIAL (E) formerly decree of divorce *a mensa et toro* = (S) judicial separation, 878.

——— VOLUNTARY (S) = (E) same, by a deed of separation, 881.

SEPTENNIAL LIMITATION (S) as to obligations of cautionry, 491.

SEQUELS (S) *i. e.*, payments to servants of a mill by tenants of thirled lands = (E) not known. *See* "Thirlage, Mill."

SEQUESTRATION (*i. e., mercantile*) (S) = (E) as to a select class called "traders," "Bankruptcy;" as to all others, if alive, "Insolvency." If the debtor is dead, a creditor's or administration suit in Ch. is necessary, 1174, 1186.

——— (E) *i. e.*, execution against a beneficed clergyman's goods or estate ≠ (S) no term.

——— (E) *i. e.*, writ in Ch. taking the lands and goods of a contumacious person = (S) letters of poinding, 1155.

——— AWARDING OF (S) = (E) adjudication of bankruptcy, 1175.

——— LANDLORD'S (S) = (E) distress, or distraining the tenant's goods, 406.

——— RECALL OF LANDLORD'S (S) = (E) distress being extrajudicial, there is only an action for excessive distress, or an action of replevin, as the case may be.

SERJEANT-AT-ARMS (E) *i. e.*, an officer in the Court of Chancery who executes process for contempt, after which sequestration issues = (S) not used, 1155.

——— AT-LAW (E) a barrister at law who has acquired the degree of the coif (so called from a patch on the top of the wig), by which he obtains precedence over all but Queen's counsel = (S) not known, 1210.

SERVANT, *see* "Master and Servant;" wages privileged on death of master, 686, 832; in bankruptcy, 833; in landlord's distress, 835; limitation of action, 836; seduction, 838.

SERVICE (E) of summons, notic s, etc. = (S) execution of summonses, citations, etc.

——— OF HEIRS (S) a process necessary to complete the title of an heir to the heritable estate to which he has succeeded = (E) not known; no public ceremony is required, the maxim being *mortuus sasit vivum.*

——— special and general, 779.

SERVITUDE (S) = (E) easement, also right of common, but a life estate is not classed with easements.

——— of way, etc., 287, 311; of support, 312; of water-course, 288, 313; of light, 314; prescription of, 311.

SESSION, COURT OF (S) the Supreme Civil Court of Scotland, subdivided into an Outer House and an Inner House. The Outer House consists of five Lords Ordinary, each having original jurisdiction in nearly all

causes. The Inner House consists of the First Division and the Second Division, each consisting of four Judges, and entertaining appeals or reclaiming notes from the Lords Ordinary = (E) Superior Courts of Law and Equity, 1054.

SET-OFF (E) = (S) compensation, 485.

SETTLEMENT (E) which generally means a marriage settlement = (S) contract of marriage, 922; strictest kind of, known to the law, 30, 60, 151, 928.

——— (S) which generally means *mortis causâ* disposition = (E) will, 151, 661; requisites of, 662.

——— WITH CREDITORS = arrangement with creditor or deed of composition.

SETTLOR (E) *i. e.*, the person who settles real or personal estate by will or marriage settlement = (S) a settler is one who settles by disposition *mortis causa*, 661.

SEVERALTY, ESTATE in (E) where it belongs entirely to a single owner = (S) no term; estates in, 154.

SEXENNIAL PRESCRIPTION (S) = (E) Statute of Limitations as to bills of exchange, 569.

SEXTON (E) a parish officer, appointed sometimes by the rector and sometimes by the parishioners, whose duty it is to clean the church, dig graves, etc. = (S) the same, appointed by the heritors, 1005.

SHEET (S) in conveyancing and legal business generally, which consists of 250 words = (E) folio; the charge is at so much per folio. At C. L. a folio consists of 72 words; in Ch. and conveyancing, of 90 words.

SHELLEY'S CASE, the rule in, 145; does not hold in (S) 145 *n.*

SHERIFF (S) *i. e.*, a local judge or permanent judge ordinary of each county, having both civil and criminal jurisdiction = (E) subdivided into county court judge; court of Quarter Sessions; revising barrister, 940, 1166.

——— (E) *i. e.*, an annual officer appointed by the Queen, generally for each county and county of a city, whose chief business is, by his bound bailiffs, to execute writs and process whether against the person or property of debtors, etc.; also to summon jurors in civil and criminal cases = (S) the execution of writs is done by messengers-at-arms, the summoning of juries by the sheriff, 1124.

SHIPPING, joint owners, 579; freighter's lien on ship, 580; seaman's lien, 581.

SHORE, right of Crown to, 2. *See* "Sea-shore."

SHOWING CAUSE (E) *i. e.*, when a rule *nisi* is obtained on motion at C. L. it is served on the opponent, who is thereby called on to show cause why the rule asked for should not be made absolute = (S) seldom used, except as regards motions for new trials. *See* "Rule *Nisi*."

SIGNATURE, of deeds, 335; of bills of exchange, 548; of wills, 664.

SIGNET, WRITER TO THE (S) = (E) attorney or solicitor, 1219.

——— WRITS PASSING THE (S) = (E) writs.

SILENCE (S) action of declarator of putting to = (E) suit of jactitation of marriage.

SIMPLE CONTRACT (E) *i. e.*, a contract made verbally or by writing which is not under seal. Such a contract requires a consideration to support it = (S) no term; contract by word of mouth, or writing not by way of deed; no consideration is required to support it; what, 434; as disguished from contracts under seal, 435; requires a consideration, 441.

SIMPLE DESTINATION (S) = (E) any grant or conveyance of estate, including estate tail, 36.

SINGULAR SUCCESSOR (S) = (E) purchaser, *i. e.*, one not claiming by descent, 775.

SIST PARTIES, TO (S) = (E) to join other parties in a suit or action, and serve them with process.

—— PROCEDURE, TO (S) = (E) stay proceedings.

SKELETON BILLS OF EXCHANGE (S) = (E) blank bills.

SLEEPING PROCESS (S) *i. e.*, that state of the process when no step has been taken for a certain time, and an interlocutor of wakening is required before a new step can be resumed = (E) at C. L. an action is out of court, when no step has been taken in the cause for a year. After which, a month's previous notice must be given before proceedings can be renewed, 1076.

SMALL-DEBT COURT (S) that part of the sheriff's jurisdiction under which debts under £12 are disposed of summarily = (E) county court, which has a jurisdiction, however, to £50, 1166.

SOCAGE (E) a tenure by a certain and determinate service, 14.

SOCIETY (S) = (E) partnership, also joint-stock company, 629.

SOLATIUM, DOCTRINE OF (S) *i. e.*, damages for wounded feelings = (E) included to a small extent in some actions, as false imprisonment, seduction, etc., 510, 511; action for, transmits to representatives of an injured party, 511.

SOLICITOR (E) *i. e.*, a person admitted to practise before the High Court of Chancery, and who is also capable of practising in courts of law, where, however, he is more properly called an attorney = (S) the profession is divided into Writers to the Signet, Solicitors before the Supreme Court, and solicitors at law, and procurators, who are not all on the same footing, 1219.

SOLICITORS BEFORE THE SUPREME COURT OR S.S.C. (S) = (E) attorneys or solicitors, 1219.

—— AT LAW (S) *i. e.*, those who practise in Sheriff Court in Edinburgh = (E) attorneys or solicitors, 1219.

SON ASSAULT DEMESNE (E) *i. e.*, a name given to a plea in actions for trespass, that the defendant committed the assault in self-defence = (S) self-defence.

SOPITE (S) = (E) extinguish or merge.

SOPITING OF PERSONAL FEES (S) *i. e.* = (E) merger.

SORNERS (S) *i. e.*, those who masterfully take meat and drink = (E) persons stealing or robbing.

SOWMING AND ROWMING, ACTION OF (S) *i. e.*, action before sheriff to ascertain the number of cattle each party can send to a common = (E) apportioning rights of common, 279.

SPECIAL BAILIFF (E) *i.e.*, a bailiff not, as usual, appointed by and responsible to the sheriff, but one appointed by the party himself, who is responsible for any irregularity = (S) there are are no special messengers-at-arms, 1124.

—— CASE (E) *i.e.*, where parties by consent state their case in writing; a special case may now be entertained without any pleading at all, or any jury trial = (S) not known, and not competent, 1116.

—— DEMURRERS (E) now abolished, 1077.

SPECIAL LEGACY (S) = (E) specific, also demonstrative legacy, 699.

——— PLEADING (E) = (S) pleading at large is allowed, 1077.

——— OCCUPANT (E) a person occupying under a limitation of an estate *pur autre vie* and his heirs = (S) included in heir of provision, 56.

SPECIALTY, CONTRACT BY (E) = (S) no term; contract by deed, 433;—priority over simple contracts in case of death, 438, 688, 692.

SPECIFIC LEGACY (E) = (S) included in special legacy, 699.

——— PERFORMANCE OF CONTRACTS (E) = (S) implement; of contracts generally, 484, 1053; of agreement to sell land, 318.

SPEI EMPTIO (S) = (E) sale of a chance.

SPES SUCCESSIONIS (S) = (E) expectancy, which may or may not be a vested interest.

SPONSIO LUDICRIS (S) = (E) wager, 459.

SPUILZIE (S) *i. e.*, an action for taking away and intermeddling with another's goods without consent (obsolete) = (E) action of detinue, if the goods *in specie* are wanted; an action of trover would lie, if goods be converted, and damages were sought, 515.

SPUNGING-HOUSES OR LOCK-UP HOUSES (E) *i. e.*, private houses of bailiffs to which debtors are taken for the first twenty-four hours when arrested on mesne process, *i. e.*, as absconding debtors = (S) messengers-at-arms' office or lock-up house, 1128.

STATEMENT OF PRISONER before a magistrate (E) = (S) prisoner's declaration, 952, 970.

STATUTE OF DISTRIBUTIONS (E) distributing the personal estate of deceased persons dying intestate = (S) no statute, but similar rights at common law; wife dying intestate, 724; husband, 735; some of children dead, 739; hotchpot, 741; advancement of child's share, 742; how degrees of kin counted, 744; half-blood, 745; mother, father, etc., 746.

——— OF FRAUDS (E) requiring certain contracts to be in writing as to real property, 443; contracts to be performed within a year, 445; consideration on such contracts, 446; as to sale, 520.

——— OF LIMITATIONS (E) = (S) prescription as to actions, 486; as to land, 296.

——— STAPLE AND STATUTE MERCHANT (obsolete) (E) = (S) like bond with clause of registration, 130, 432.

STEELBOW (S) *i. e.*, certain goods delivered by landlord to tenant, who agrees to deliver the same quality and quantity at the end of the lease = (E) no term and unusual, but a similar provision may be made by express covenants, 397.

STENT MASTERS (S) = (E) surveyors of taxes.

STET PROCESSUS (E) an order of court to stay proceedings, which is generally with consent of parties = (S) interlocutor sisting procedure *in hoc statu.*

STEWARD OF THE MANOR (E) an officer who keeps the court rolls, and admits copyholders = (S) not known, 184.

STIPULATIONS (S) = (E) "covenants" when contained in a deed. To implement stipulations and prestations of a lease (S) = (E) to observe or fulfil the covenants of the lease.

STOLEN GOODS, sale of, in market overt, 539, 941.

STOPPAGE IN TRANSITU (E) = (S) same, 533.

STOUTHRIEF OR ROBBERY (S) = (E) robbery.

STRICT SETTLEMENT (E) *i. e.*, a settlement of real estate to A for life, and to his sons successively in tail male = (S) deed of entail is still more strict; what is strictest kind known to the law, 30, 927.

STRIKING ATTORNEY OFF THE ROLL (E) = (S) suspending or depriving a law agent, 1225.

STYLE (S) = (E) a form; in conveyancing, a precedent.

SUBALTERN RIGHTS (S) = (E) not used, but known under marshalling of assets.

SUBINFEUDATION, prohibited by statute in (E), 18, 198; contra in (S) *ib.*

SUBJECTS (S) *i. e.*, the lands included in a disposition = (E) parcels of lands, 361.

SUBPŒNA (E) *i. e.*, a writ summoning a witness to attend a trial. The witness cannot in general be arrested, unless after he has failed to attend = (S) letters of first diligence citing a witness. If the witness is not likely to attend, or refuses, a letter of second diligence can be had to arrest him, 976, 1090.

——— DUCES TECUM (E) = (S) letter of first diligence citing a haver as witness.

SUBSTITUTE (S) in a legacy or destination = (E) person taking as substituted legatee, or in real estate as remainderman, 703, 728.

——— IN AN ENTAIL (S) = (E) tenants in tail in remainder, 42, 728.

SUBSTITUTION (S) = (E) limitation to successive persons in a settlement in legacies, 700, 703.

SUCCESSION (S) to a deceased person's property, subdivided into heritable succession, which is by deed *mortis causa*, and into moveable succession, either of which may be testate or intestate = (E) not used; as to lands, taking by descent; as to personalty, taking by will or by letters of administration; also taking as legatee or next of kin under the Statute of Distributions, 660, *et seq*; in international law, 1282.

SUCCESSOR (S) = (E) heir at law, as to real property; executor or administrator, as to personalty.

——— SINGULAR (S) = (E) purchaser.

SUCKEN (S) *i. e.*, lands thirled to a mill = (E) lands in respect of which there is a custom or covenant to grind at a particular mill.

SUGGESTION ON A RECORD (E). *i. e.*, the entering of some matter *dehors* the action, so as to influence costs, etc. = (S) lodging a minute in process.

SUIT IN CHANCERY (E) = (S) action; outline of, 1152, *et seq.*

SUMMARY ACTIONS (S) *i. e.*, those carried on before justices of the peace = (E) proceedings before magistrates in Sessions; information or complaint.

——— ACTIONS (S) *i. e.*, in Court of Session = (E) motions at C. L.; petitions in Ch.

——— DILIGENCE (S) *i. e.*, where diligence is had without action = (E) not known; but actions on bills of exchange are privileged, 568; on bonds, 448.

SUMMONS, JUDGE'S (E) *i. e.*, a writ, bringing a party before a judge at Chambers. In Ch. a mere warrant of citation = (S) included in execution of incident diligence.

——— OF AN ACTION (S) = (E) writ of summons at C. L., also the declaration. In Ch. the summons is in the nature of a petition, and called a bill or claim, 1068, 1152.

SUNDAY, Contracts on, 460.

SUPERIOR (S) = (E) in copyhold, lord of manor, 173, *et seq.*; in freeholds, little known, 18.

——— COURTS OF COMMON LAW, *i. e.*, Queen's Bench, Common Pleas, and Court of Exchequer = (S) Court of Session, Court of Exchequer, 1055.

——— OF EQUITY (E) or Court of Chancery = (S) Court of Session, 1052.

SUPERIORITY (S) *dominium directum* = (E) in freehold, included in freehold of inheritance; in copyhold, manorial right or seignory, 173, 256. *See* "Feu."

SUPERSEDEAS, WRIT OF (E) *i. e.*, discharging a prisoner confined for debt = (S) liberation.

SUPERSEDERE (S) = (E) consent to stay proceedings for a certain time.

SUPPLEMENT, LETTERS OF (S) = (E) subpœna from Crown Office in criminal cases; in civil cases, no term.

——— OATH IN (S) = (E) evidence on oath, 1104.

SUPPLEMENTARY SUMMONS (S) *i. e.*, to bring in additional parties = (E) in Ch. supplemental bill.

SURETY (E) = (S) cautioner; contract of guarantee, 620; limitation of actions on contract, 491, 624; discharge of, 623; surety and debts sued jointly, 626; surety on payment entitled to assignment of security, *ib.*

SURPLUS RENT (S) = (E) improved rent.

SURREBUTTER (E) *i. e.*, the pleading of a plaintiff in answer to the defendant's rebutter = (S) re-revised condescendence.

SURREJOINDER (E) *i. e.*, the pleading of a plaintiff in answer to the defendant's rejoinder = (S) revised condescendence.

SURRENDER of lease (E) = (S) renunciation, 384.

——— of copyhold (E) 185 = (S) resignation.

——— to the use of the lord (E) = (S) resignation *in remanentiam*, 364.

——— to the use of the purchaser (E) = (S) resignation *in favorem*, 361, 364.

SURROGATE (E) deputy of a bishop = (S) not known.

SURVIVORSHIP (E) (among joint-tenants, creditors, etc.) = (S) the same; but it seldom exists unless by express words; in land, 157, 161; in contracts, 630; in trusts, 244.

SUSPENSION (S) *i.e.*, mode of staying proceedings = (E) at C .L. not known, except in some cases called prohibition; in Ch., bill or motion for injunction, or to stay proceedings.

——— AND INTERDICT (S) = (E) in Ch., bill to stay proceedings and injunction; at C. L., prohibition, also injunction in other cases.

——— AND LIBERATION (S) = (E) motion to discharge a prisoner.

SWANS on sea belong to Crown in (E) 5; *contra* in (S) *ib.*

SWEARING THE PEACE (E) *i. e.*, taking out articles of the peace against a person who threatens the life of the applicant = (S) taking out letters of lawburrows.

SYNOD (S) an ecclesiastical body or church court, composed of the members of several presbyteries. There is an appeal from each presbytery to the synod, and thence to the General Assembly = (E) not known, 991.

TACIT RELOCATION (S) = (E) not used; implied renewal of tenancy from

holding over, 77, 420; also implied renewal of hiring, from remaining in service, 830.

TACITURNITY (S) = (E) non-claim, non-user.

TACK (S) = (E) lease.

TACKING OF MORTGAGES (E) a mode whereby an intermediate mortgagee can often be postponed to the first and third mortgagee = (S) not known, 114.

TACKSMAN (S) = (E) tenant.

TAILZIE, *i. e.*, deed of entail (S) by which, if properly executed, the property could be tied up *ad infinitum*, until recently; there is now a qualified right to disentail = (E) no term; included in strict settlement, and will, or grant, none of which, however, are so strict, 28.

TAXATION OF COSTS (E) = (S) audit of accounts, 1222.

TAXES as between landlord and tenant, 390.

TAXING MASTERS (E) *i. e.*, certain officers of the Court of Chancery who tax costs = (S) auditor of the Court of Session.

TEIND COURT (S) *i. e.*, the Court of Session acts as such = (E) no court of similar jurisdiction, but Ecclesiastical Commissioners unite or disjoin parishes, etc., 1019.

TEINDS (S) = (E) tithes, 1019.

TEMPLE, Inner and Middle (E) two of the Inns of Court, having, with Gray's Inn and Lincoln's Inn, the exclusive right to call to the bar = (S) Faculty of Advocates, 1209.

——— LANDS (S) certain lands exempt from tithes, as being formerly the property of the Knights Templars = (E) abbey lands.

TENANCY AT WILL (E) = (S) the same, 76.

———BY ENTIRETIES (E) = (S) not known, 167.

——— IN COMMON (E) = (S) common property, 162; partition of, 163.

——— ON SUFFERANCE (E) = (S) the same, 77.

TENDER of performance of contract, 466; of payment, 469; of rent, 468; on the day appointed, 467.

TENOR, PROVING THE (S) an action to establish the substance and authenticity of a lost or destroyed deed = (E) bill in Chancery seeking to have the benefit of the deed, etc., 1101.

TENURE OF LAND in (E) 13, *et seq.*; subinfeudation prohibited in (E), 14; *contra* in (S) *ib.*

TERCE (S) = (E) dower; to exclude terce (S) = (E) to bar dower of wife, 907; how excluded, 908; kenning to the terce, 911.

TERCER (S) = (E) tenant in dower or doweress.

TERMINATION of lease (E) = (S) the same; also ish, 379.

TERMOR (E) he who is the owner of a term or lease = (S) lessor.

TERMS, legal, as to landlord and tenant (S) *i. e.*, Whitsunday, 15th May; Lammas, 1st August; Martinmas, 11th November; Candlemas, 2d February = (E) the four terms are—Lady-day, 25th March; Midsummer, 24th June; Michaelmas-day, 25th September; Christmas, 25th December.

——— LEGAL (E) for sittings of Court, viz., Michaelmas, 2d November; Hilary, 11th January; Easter, 15th April; Trinity, 27th June = (S) the winter session is from 12th November to 20th March, and the summer session is from 12th May to 20th July.

——— OF YEARS (E) = (S) leases.

TESTAMENT (S) which operates only on moveable property = (E) the same; or will, which operates on both real and personal property, 660; in international law, 1294.

——— DATIVE (S) = (E) letters of administration, 680.

——— TESTAMENTAR (S) = (E) will naming executor, 680.

TESTATUM (E) or witnessing part of a deed = (S) included in dispositive clause, 316.

TESTE (E) *i. e.*, the witnessing part of a writ of summons = (S) not used.

TESTIMONIUM (E) = (S) testing-clause, 344, *et seq.*

TESTING CLAUSE (S) = (E) attestation clause, or testimonium; in deeds, 344; in wills, 666.

——— REQUISITES OF, 345 *n.*

THEFT (S) = (E) larceny.

THELLUSSON Act (E) *i. e.*, 39 & 40 Geo. III., c. 98 = (S) extended to (S) as to moveables; also to heritage by 11 & 12 Vic., c. 36, § 41, 215.

THIRDS (E) *i. e.*, the right of a widow to one-third of her husband's personal property, if she survive; but which he can defeat by will = (S) *jus relictæ*, which cannot be defeated by will or deed, 673, 902.

THIRLAGE (S) a very common right, resembling a servitude, whereby tenants are bound to grind their corn at a particular mill = (E) suit to a mill, which is either by custom or by covenant, 290.

TIMBER, RIGHT TO, of tenant in tail, 49; by tenant for life, 64, 65, 66.

TINSEL OF THE FEU (S) *i. e.*, irritancy after two years' arrears = (E) not known; forfeiture, 179.

——— OF SUPERIORITY (S) *i. e.*, irritancy incurred by superior who is himself unentered, whereby he loses casualties due from the vassal = (E) in freehold, not known; in copyhold, no forfeiture on that ground, 199.

TITHES (E) = (S) teinds, 1019.

TITLE, the feudal (S) 13, 16, 364.

—— DEEDS, custody of, in mortgage, 99; concealment of, see *Addenda;* registration of, 366.

TOCHER (S) = (E) portion of wife; legacy, how far satisfaction of, 711.

TOLERANCE, tenant by (S) = (E) tenant on sufferance.

TOLL, thorough, requires a consideration in (E) 7; *quære* as to (S) *ib.;* see *Addenda.*

TORT (E) = (S) quasi delict; generally, 506; death of wrongdoer, 507; criminal punishment, 509; damages, 510; actions for tort to deceased person, 511; seduction, 512; criminal conversation, 513; false imprisonment, 514; limitation of actions, 515.

TRADITION (S) = (E) delivery.

TRANSACTION (S) = (E) compromise or agreement between two or more parties tending to settlement of doubtful and controverted claims; as to moveables, 452.

TRANSFERENCE, ACTION OF (S) = (E) at C. L., during action before judgment, a suggestion of the death of a party; after judgment, by writ of revivor or *scire facias;* if death happens between interlocutory and final judgment, a writ of revivor is necessary. In Ch., bill of revivor.

TRANSLATION OF BOND (S) *i. e.*, any assignation after the first = (E) assignment, also called *mesne* assignment in recitals.

TRANSITORY ACTIONS (E) *i. e.*, actions in which the venue may be laid in any

county = (S) not used, there being no venue in the same sense, 1079, 1241.

TRANSPORTATION OF CHURCH (S) = (E) rebuilding on another site.

TRANSUMPT, ACTION OF (S) *i. e.*, an action raised by one having an interest in a deed or writing, to have it produced, so that a copy may be taken in court, and certified by the clerk of court = (E) suit to enforce covenant to produce; rule to inspect document; bill for discovery, 1100.

TRAVERSE (E) *i. e.*, a pleading at C. L., which expressly denies the facts of the opposite pleading = (S) no term; denial.

TRAVERSING NOTE (E) a note filed by a plaintiff in Ch. for the defendant, who has failed to plead, answer, or demur, in which case it is assumed that he means to traverse = (S) not used.

TREASURE-TROVE, *i. e.*, gold, etc., found hid in the earth (E) = (S) same term; right of Crown to, in (E) 10.

TRESPASS (E) *i. e.*, an action brought to recover damages for injury to the person, or to the property = (S) action of damages, as to person; action for trespassing, as to heritable property, 1058.

——— (E) a direct injury, as an assault, etc. = (S) not used; assault.

TRIAL AT BAR (E) *i. e.*, a trial, not as usual before one judge only, but before the full court in banc = (S) not used.

——— BY PROVISO (E) *i. e.*, a trial at the instance of a defendant when the plaintiff delays = (S) not used.

——— DE NOVO (E) formerly a *venire de novo*, or a new trial directed on some ground of irregularity *ex facie* of the record = (S) included in new trial.

——— of prisoners, 965.

——— WRIT OF (E) *i. e.*, a writ directed to a sheriff or county court judge to assess the damages after judgment by default, signed by the plaintiff, in an action for unliquidated damages = (S) not used.

TRIENNIAL PRESCRIPTION (S) *i. e.*, a prescription which applies to servants' and workmen's wages, tradesmen's accounts, etc. = (E) no such limitation; but a six years' limitation cuts off the right of action, 492.

TROVER (E) *i. e.*, action to recover damages for converting or appropriating one's chattels = (S) action of restitution, possessory action, 515, 1058.

TRUST; origin of trusts, 201; trusts in courts of law and equity, 202; classification of trusts, 203; trusts how declared, 204; writing how signed, 206; proof by oath of trustee, 207; legal estate in trustee, 208; general power of trustee, 211; trusts how far enforced, 212; object of trust, 215; restriction on alienation, 216; acceptance or refusal of trust, 219; resulting trusts, 220; disposition of legal, but not equitable, estate, 221; constructive trusts, 223; purchase in name of third person, 224; trustee's liability for co-trustee, 226; trustee making profit of trust, 227; duty to keep funds, 230; investment of trust monies, 231; investing in mortgages, 232; liability to pay interest, 233; trustee paying money into court, 234; trustees for sale, 235; trust for payment of debts, 238; trustees for charity, 241; trustees delegating trust, 242; one of trustees dying, 243; joint office of trustees, 244; discharge of trustees, 245; failure of trustee, 246; *cestui que trust's* estate, 247; execution at law against *cestui que trust*, 248; remedy of *cestui que trust*, 249; prescription, 250.

TRUSTEE ON BANKRUPT'S ESTATE (S) = (E) assignees in bankruptcy, 1175.

TRUSTEE on sequestrated estate of a deceased person (S) = (E) receiver.
TRUSTER (S) = (E) settlor; sometimes *celui que trust.*
TUBMAN (E) a barrister holding an honorary office in the Court of Exchequer, which gives him a certain right of pre-audience = (S) not known.
TURBARY, COMMON OF (E) = (S) servitude of fuel, feal, and divot, 281.
TURNPIKE (S) = (E) the same; highway.
TURPIS CAUSA (S) = (E) a consideration *contra bonos mores*, or against public policy.
TUTOR OF PUPIL (S) = (E) guardian of infant, 819, 1334; actions against, 814.
TUTORING A WITNESS (S) = (E) telling or suggesting to him what to say, 1108.

UDAL RIGHTS (S) *i. e.*, a peculiar holding of the Crown without charter or sasine, but by possession only = (E) not known; or rather, all lands are now held in this sense.
ULTIMUS HÆRES (S) *i. e.*, the Crown = (E) the Crown's right to escheat.
ULTRONEOUS WITNESS (S) = (E) voluntary witness.
UNDER-LEASE, to mortgagee, 382; right to grant, 388; distraining in case of, 418.
UNILATERAL DEED (S) = (E) deed poll.
——— TRUST-DEED (S) = (E) deed creating a trust for creditors.
UNIVERSAL LEGATEE OR DISPONEE (S) = (E) legatee or devisee of the personal or real estate as a whole; residuary legatee or devisee.
UNIVERSITAS (S) = (E) the whole real and personal property of a person deceased.
UNLAWFUL ASSEMBLY (E) = (S) mobbing.
URBAN SERVITUDES (S) = (E) easements over real property in towns; also right of common over the same.
USE (E) ancient name for trust.
—— AND OCCUPATION (E) the form of words usual in pleadings in an action for rent against a person who has held and enjoyed lands not under a written deed.
USES, STATUTE OF (E) a statute of 27 Hen. VIII., c. 10, passed to control trusts, 201.
USUFRUCT OR LIFERENT (S) = (E) life estate.
UTERINE BROTHER OR SISTER (S) one by the same mother, but not by the same father = (E) seldom used, 745.

VACATION, LONG (E) a period of the year between 10th August and 24th October, when neither party can be compelled to take a step in pleading, but otherwise the action does not suffer interruption = (S) not used, but there is also a vacation at the same period.
VARIATION, as between summons and condescendence, etc. (S) = (E) variance.
VASSAL (S) = (E) old term was villein; now tenant, in copyhold tenure, and also in freehold, if there is a lord.
——— relation to Crown, 13.
VENDITIONI EXPONAS (E) a writ by which a sheriff who has taken goods under a *fi. fa.* is commanded to sell them for what they will fetch = (S) not used; sale by order of the sheriff.

VENIRE DE NOVO (E) now called a trial *de novo*, *i. e.*, a new trial granted on the ground of some defect *ex facie* of the record = (S) included in "New Trial."

VENUE (E) *i. e.*, the locus or county in which the cause of action or indictment is alleged to be laid and which regulates the place where the trial shall take place = (S) not known, 940, 1079.

VERDICT (E) in both civil and criminal cases must be unanimous, and if the jury cannot agree, they can only be discharged = (S) in civil cases the jury need not be unanimous, but a majority of nine will suffice, 1112. In criminal cases the verdict of a majority suffices, 969. If in civil cases, the jury have been locked up six hours, the judge discharges them.

VERGENS AD INOPIAM (S) = (E) in insolvent circumstances. In general in (E) landlords or creditors can take no step to secure against debts of a person in insolvent circumstances, not yet due, 1120.

VERIFICATION (E) a term used formerly at the end of pleadings implying that the party was ready to prove the facts alleged = (S) not used.

VERITY, OATH OF (S) = (E) affidavit of debt in bankruptcy.

VESTED remainder, 144.

VESTRY (E) *i. e.*, parochial meeting of the inhabitants to pass a rate, etc. = (S) not known, 1001, 1002.

VICAR (E) the incumbent of an appropriated or impropriated benefice = (S) minister, 994; vicarage, 1013.

VICENNIAL PRESCRIPTION OR LIMITATION (S) which applies to holograph bonds and subscriptions = (E) limitation, which would be six years or twenty years, according as the writing was not or was under seal, 489.

——— from what day it is counted, 493.

VI ET ARMIS (E) *i. e.*, with force and arms, a phrase used in pleadings to express forcible violence = (S) not used.

VIEW, RULE FOR A (E) *i. e.*, where it is desirable that a jury or some of them, called viewers, should see the *locus in quo* before trial = (S) not used, but in other than jury trials a remit is often made to a surveyor, etc., to inspect and report; and the jury may also be allowed to see the *locus*.

VILL (E) an outpart of a parish or small village = (S) not used.

VILLEIN (E) = (S) vassal. All holders of property in (S) are vassals of the Crown, or of some vassal of the Crown, immediate or remote.

VIOLENT PROFITS (S) = (E) included under mesne profits. Double value or double rent is recoverable for holding over (violent possession S) after due notice to quit (warning S), 421.

VISITOR (E) of an ecclesiastical or eleemosynary corporation = (S) not known, 652.

VITIOUS INTROMISSION (S) = (E) conduct of an executor *de son tort*, 695.

——— INTROMITTER (S) = (E) executor *de son tort*.

VOIR DIRE (E) examination on the, *i. e.*, examining a witness as to some preliminary matters to test whether he is a competent witness = (S) examination *in initialibus*.

VOTE at elections of members of Parliament for mortgaged estates, 122.

WADSET (S) (superseded by bond and disposition in security) = (E) Welsh mortgage, 91.

WADSETTER (obsolete) (S) = (E) mortgagee.
WAGERS not prohibited at common law in (E) but by statute, 459.
WAGES, ARRESTMENT OF (S) = (E) attachment of, not allowed, 837.
WAIFS, *i. e.*, goods thrown away by thief in his flight, 10.
WAKENING, INTERLOCUTOR OF (S) *i. e.*, an order of the court in a process which had fallen asleep, by which it is revived, and the parties can proceed as before = (E) order to revive in Ch. At C. L. a month's notice of intention to proceed, no rule or order of court being necessary, 1076.
WARD OF CHANCERY (E) = (S) pupil or minor (according to age). The Court of S. does not take charge of pupils, except by appointing tutors or curators, or curator bonis or judicial factor, 819.
WARNING (S) by a servant or master = (E) notice to leave, 828.
——— IN LEASES (S) = (E) notice to quit, 420, 424; necessary in all cases, 420.
——— PASSING FROM (S) = (E) waiver of notice to quit or to leave.
WARRANDICE (S) = (E) warranty; covenant for title, 320, 361.
——— (S) from fact and deed = (E) covenant that the vendor or assignor has title, 361.
——— (S) against all deadly or against all mortals, *i. e.*, absolute warrandice = (E) absolute warranty.
——— (S) real, *i. e.*, giving warranty lands to secure a conveyance = (E) not known; and in exchanges no warranty is now implied, 8 & 9 Vic., c. 106, 320.
WARRANT OF ATTORNEY (E) *i. e.*, a power given by a debtor confessing a cause of action, and authorising judgment to be entered up against him without any action = (S) not known; but a clause of consent to registration in a deed has the same effect, decree of registration being competent at once. So, granting a bill of exchange implies a right of summary diligence, 1117.
——— OF COMMITMENT (S) = (E) same.
WARRANTY (E) a security or guarantee = (S) warrandice.
WASTE (E) *i. e.*, damage done by tenant for life or years to the reversion = (S) seldom used; damage.
——— by tenant for life, 64, 65; tenant without impeachment of waste, 66.
——— (E) *i. e.*, a common = (S) common, 284.
WATER-COURSE, easement of, 288.
WAY, RIGHT OF, AN EASEMENT (E) 287; highway, *ibid.*
WAYGONG CROP (S) = (E) away-going crop.
WHITEBONNET (S) = (E) a puffer at auctions, 330.
WHITSUNDAY (S) one of the two usual half-yearly terms as between landlord and tenant and for other purposes, viz., 15th May = (E) not known; the nearest terms are Midsummer-day, 24th June, and Lady-day, 25th March.
WIDOW'S JUS RELICTÆ (S) *i. e.*, one third or one half of the goods in communion, which the husband cannot defeat by will or deed = (E) not now known, formerly known in London as widow's chamber; but if there is no will, she has her thirds under the Statute of Distributions, 673, 902.
——— TERCE (S) = (E) widow's dower, 907.
WIFE. *See* "Marriage," 858, *et seq.*

WILL (E) which passes real as well as personal property = (S) will or testament, which is confined to moveable property.

——— meaning of terms, 660; will not classed with deeds, 661; passes real estate, 662; formalities of will, 663; signature, 664; witnesses, 666, 669; handwriting, 667; infants and feme coverts, 671, 894; powers of testator, 673; deadman's part, 674; made on deathbed, 675; revocation, 676; verbal will, 678; donation *mortis causa*, 679; nomination of executor, 680; vesting of estate, 681; executor dying, 682; executor's claim to residue, 683; executor's duty to pay debts, 684; privileged debts, 685; priority of debts, 688; time for paying debts, 689; preference of debt by executor, 690; legal and equitable assets, 691; marshalling of assets, 693; executor *de son tort*, 695; executor's personal liability, 696; legacies, 699; heirlooms, 712; real and personal, 715; will of lands, 718, *et seq.*; in international law, 1294.

——— OF SUMMONS (S) or conclusions of the libel = (E) not known at C. L; in Ch. prayer of bill, 1068.

WILFUL FIRE-RAISING (S) = (E) arson.

WITHDRAWING A JUROR (E) *i. e.*, a mode of putting an end to a trial and action by the parties agreeing to withdraw a juror, whereon the rest of the jury are discharged. The effect depends on the agreement of the parties at the time, but such agreement usually is, that no fresh action shall be brought = (S) not known.

——— THE RECORD (E) *i. e.*, when a party, after entering a record for trial at *nisi prius* for some reason, such as the non-attendance of a witness, wants to avoid the expense of going further, he withdraws the record, and must pay the costs of the day = (S) not used.

WITHOUT IMPEACHMENT OF WASTE (E) a short phrase, signifying that a tenant for life has full powers to cut timber (except ornamental timber), dig mines, etc., without being called to account by the remainderman = (S) not used; but similar powers may be given, if the language is express, 66.

WITNESS, infirm, etc.; commission to take deposition of, to lie *in retentis* = (E) commission to examine a witness abroad; rule for examination of witness, if within jurisdiction, 1093, 1094.

——— to deeds, 341; to wills, 666, 669; in criminal cases, 951, 974; in civil cases, 1090, *et seq.*

——— INITIAL EXAMINATION OF (S) = (E) examination on the *voir dire*.

——— privilege of, from arrest, 1092. *See* "Protection."

——— prisoner (E) a prisoner is brought by an officer to the court to give evidence, under a writ of *habeas corpus* = (S) warrant from the court to produce the prisoner, 1090.

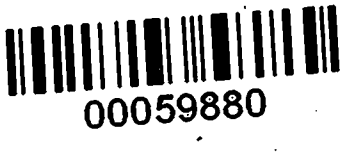
WRECK, right to, 4.

WRIT OF CA. SA (E) *i. e.* writ of execution, by which the person of the judgment debtor is taken by the sheriff, and he is imprisoned until he pay the debt = (S) warrant to imprison, 1126.

——— OF CAPIAS (E) a writ by which the sheriff is directed to arrest a defendant about to abscond, or go out of the jurisdiction of the English courts = (S) warrant to apprehend a debtor *in meditatione fugæ*, 1140.

——— OF DEBTOR to bar prescription (S) = (E) acknowledgment in writing, 496.

——— OF ELEGIT (E) *i. e.*, the writ of execution against a judgment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